ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2005-TX-0025; FRL-_____]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Modification of Existing Qualified Facilities Program and General Definitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: EPA is taking final action to disapprove revisions to the SIP submitted by the State of Texas that relate to the Modification of Existing Qualified Facilities (the Qualified Facilities Program or the Program). EPA is disapproving the Texas Qualified Facilities Program because it does not meet the Minor NSR SIP requirements nor does it meet the NSR SIP requirements for a substitute Major NSR SIP revision.

EPA is also approving three definitions that are severable from the Qualified Facilities submittals. These three definitions we are approving are, "grandfathered facility," "maximum allowable emission rate table (MAERT)," and "new facility." Moreover, we are making an administrative correction to the SIP-approved definition of "facility."

We are taking this action under section 110, part C, and part D of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on [**INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2005-TX-0025. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30am and 4:30pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality,

12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7212; fax number 214-665-7263; e-mail address spruiell.stanley@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the following terms have the meanings described below:

- "we," "us," and "our" refer to EPA.
- "Act" or "CAA" means Federal Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations – Protection of Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of

stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.

- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.
- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.
- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- "Program" means the SIP revision submittals from the TCEQ concerning the Texas Qualified Facilities Program.
- "NAAQS" means any national ambient air quality standard established under 40 CFR part 50.

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I. What Action is EPA Taking?

EPA is taking final action to disapprove the Texas Qualified Facilities Program, as submitted by Texas on March 13, 1996, and July 22, 1998, in Title 30 of the Texas Administrative Code (30 TAC) at 30 TAC Chapter 116 – Control of Air Pollution by Permits for New Construction or Modification. This includes the following regulations under Chapter 116: 30 TAC 116.116(e), 30 TAC 116.117, 30 TAC 116.118, and the following definitions under 30 TAC 116.10 -- General Definitions: 30 TAC 116.10(1) – definition of "actual emissions," 30 TAC 116.10(2) – definition of "allowable emissions," 30 TAC 116.10(11)(E) under the definition of "modification of existing facility," and 30 TAC 116.10(16) – definition of "qualified facility." These regulations and definitions do not meet the requirements of the Act and EPA's NSR regulations. It is EPA's position that none of these identified elements for the submitted Qualified Facilities Program is severable from each other.

Secondly, in an action separate from the above action on the submitted Texas Qualified Facilities Program, we are approving the following severable definitions: 30 TAC 116.10(8) – definition of "grandfathered facility," 30 TAC 116.10(10) – definition of "maximum allowable emission rate table (MAERT)," and 30 TAC 116.10(12) – definition of "new facility." It is EPA's position that these definitions are severable from those in the submitted Texas Qualified Facilities Program; moreover, each is severable from each other.

EPA proposed the above actions on September 23, 2009 (74 FR 48450). We accepted comments from the public on this proposal from September 23, 2009, until November 23, 2009. A summary of the comments received and our evaluation thereof is discussed in section V below. In the proposal and in the Technical Support Document (TSD), we described our basis for the actions identified above. The reader should refer to the proposal, the TSD, section IV of this preamble, and the Response to Comments in section V of this preamble for additional information relating to our final action.

We are disapproving the submitted Texas Qualified Facilities Program as not meeting the requirements for a substitute Major NSR SIP revision. Our grounds for disapproval as a substitute Major NSR SIP revision include the following:

- it is not clearly limited to Minor NSR thereby allowing major modifications to occur without a Major NSR permit;

- it has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements thereby allowing changes at existing facilities to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;
- it does not require that first an applicability determination be made whether the modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;
- it does not include a demonstration from the TCEQ, as required by 40 CFR 51.166(a)(7)(iv), showing how the use of "modification" is at least as stringent as the definition of "modification" in the EPA Major NSR SIP program
- it does not include the requirement to make Major NSR applicability determinations based on actual emissions and on emissions increases and decreases (netting) that occur within a major stationary source;
- it fails to meet the statutory and regulatory requirements for a SIP revision;
- it is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions; and
- EPA lacks sufficient available information to determine that the requested relaxation to the Texas Major NSR SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the Act.

In addition to the failures to protect Major NSR SIP requirements, EPA cannot find that the submitted Program, as an exemption to the State's Minor NSR SIP program,

will ensure noninterference with NAAQS attainment, and there will not be a violation of applicable portions of a Texas SIP control strategy, as required by section 110(a)(2)(D) and 40 CFR 51.160(a)-(b). EPA cannot approve the exempting of certain modifications from obtaining a Minor NSR SIP permit as part of the Texas Minor NSR SIP because the Act and EPA regulations are not met and the State has not shown that the sources will have only a *de minimis* effect. The Program fails to include legally enforceable procedures to ensure that the State will not permit a modification that will violate the control strategies or interfere with NAAQS attainment. Our grounds for disapproval as a Minor NSR SIP revision include the following:

- it is not clearly limited to Minor NSR thereby allowing major modifications to occur without a Major NSR permit;
- it has no regulatory provisions clearly prohibiting the use of this Program from circumventing the Major NSR SIP requirements thereby allowing sources to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a Major NSR preconstruction permit;
- it does not require that first an applicability determination be made whether the modification is subject to Major NSR thereby exempting new major stationary sources and major modifications from the EPA Major NSR SIP requirements;
- it fails to meet the statutory and regulatory requirements for a SIP revision;
- it is not consistent with applicable statutory and regulatory requirements as interpreted in EPA policy and guidance on SIP revisions;
- it is not an enforceable Minor NSR permitting program;

- it lacks legally enforceable safeguards to ensure that the exempted changes will not violate a Texas control strategy and will not interfere with NAAQS attainment;
- EPA lacks sufficient available information to determine that the requested relaxation to the Texas Minor NSR SIP will not interfere with any applicable requirement concerning attainment and RFP, or any other applicable requirement of the Act.

The provisions in these submittals relating to the Texas Qualified Facilities State Program that include the Chapter 116 regulatory provisions and the nonseverable definitions in the General Definitions were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted Texas Qualified Facilities State Program does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

II. What Submittals is EPA Taking No Action On?

A. Subparagraph (F) under the definition of "federally enforceable"

On September 18, 2002 (67 FR 58697), EPA approved the definition of "federally enforceable" in 30 TAC 116.10(7), introductory paragraph and subparagraphs (A) through (E), as submitted July 22, 1998. We proposed to take no action on the submitted severable new subparagraph (F) under the SIP-approved definition of "federally enforceable," submitted September 11, 2000, because it is outside the scope of the SIP.

See 74 FR 48450, at 48466. EPA is not finalizing action today on the proposal concerning the submitted 30 TAC 116.10(7)(F). This subparagraph (F) is severable from the final rulemaking on the Qualified Facilities Program

B. Definition of "best available control technology (BACT)"

On September 23, 2009, EPA proposed to disapprove the definition "best available control technology (BACT)" under 30 TAC 1161.10(3). 74 FR 48450, at 48463-48464. EPA is still reviewing approvability of this definition; therefore, we are not taking final action on the proposal today. This definition is severable from the final rulemaking on the Qualified Facilities Program. We will take final action on the definition of BACT when we take action on Texas's submission concerning NSR Reform (Rule Project Number 2005-010-116-PR), which also addresses BACT. *See* 74 FR 48450, at 48472.[1] Under the Consent Decree entered on January 21, 2010 in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex), EPA's final action concerning NSR Reform will be finalized by August 31, 2010.

C. Subparagraphs (A) and (B) of the submitted definition of "modification of existing facility"

[1] EPA made this determination in a separate proposed action published at 74 FR 48467, September 23, 2009. This proposal relates to Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit.

Also, on September 23, 2009, EPA proposed to disapprove 30 TAC 116.10(11) subparagraphs (A) and (B) of the submitted definition of "modification of existing facility," which are severable from the other submissions addressed in this notice but not severable from each other. 74 FR 48450, at 48464-48465. EPA is not taking final action today on the proposed disapproval of these submitted subparagraphs under the submitted definition of "modification of existing facility" at 30 TAC 116.0(11)(A) and (B). We are still reviewing the proposed disapproval of these subparagraphs 30 TAC 116.10(11)(A) and (B) which relate to "insignificant increases." These subparagraphs are severable from this final rulemaking on the Qualified Facilities Program. We will take final action on 30 TAC 116.10(11)(A) and (B) when we act on Texas's submission concerning Air Permits (SB 766) Phase II (Rule Project Number 99029B-116-A1). Under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex), that action will be finalized by December 31, 2012. Additionally, we have received petitions requesting EPA review of the State's implementation of Texas Commission on Environmental Quality's (TCEQ) permit by rule (PBR) program under Subchapter K (30 TAC Chapter 106).[2] EPA intends to review TCEQ's PBR program and its implementation in response to those petitions.

D. Subparagraph (G) of the submitted definition of "modification of existing facility"

[2] Petitions, August 28, 2008, from the Environmental Integrity Project on behalf of the Galveston-Houston Association for Smog Prevention, Environmental Integrity Project, Texas Campaign for the Environment, Sierra Club, and Public Citizen; and January 5, 2009, supplementing the August 28, 2008, petition (the supplemental petition added the Environmental Defense Fund as an additional petitioner).

On September 23, 2009, EPA proposed to disapprove the subparagraph (G) at 30 TAC 116.10(11) of the submitted definition of "modification of existing facility." *See* 74 FR 48450, at 48465. EPA is not taking final action today on the proposed disapproval of the submitted subparagraph (G) of the definition of "modification of existing facility." We are still reviewing the proposed disapproval of this definition. This subparagraph states that changes to certain natural gas processing, treating, or compression facilities are not modifications if the change does not result in an annual emissions rate of any air contaminant in excess of the volume emitted at the maximum design capacity for grandfathered facilities. This definition is severable from this rulemaking on the Qualified Facilities Program. *See* 74 FR 48450, at 48452. We will take final action on 30 TAC 116.10(11)(G) when we act on Texas's submission concerning Air Permits (SB 766) Phase II (Rule Project Number 99029B-116-A1). Under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex), that action will be finalized by December 31, 2012.

E. Trading Provision in 30 TAC 116.116(f)

EPA proposed to take no action on the submitted portion of 30 TAC 116.116(f) that includes, among other things, a trading provision containing a cross-reference that is no longer in Texas's rules. *See* 74 FR 48450, at 48465-48466. EPA is not taking final action today on this submitted portion because we are still reviewing approvability of the provision. This portion of the provision is severable from this rulemaking on the Qualified Facilities Program. We will take final action on 30 TAC 116.116(f) when we

take action on Texas's submission concerning NSR Rules Revisions; 112(g) Revisions (Rule Project No. 98001-116-AI). Under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex), that action will be finalized by October 31, 2011.

III. What is the Background?

A. Summary of Our Proposed Action

Also on September 23, 2009 (74 FR 48450), EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities. These affected provisions include regulatory provisions at 30 TAC 116.116(e) and definitions of "actual emissions," "allowable emissions," a nonseverable portion of the definition at subparagraph (E) of "modification of existing facility," and "qualified facility" under Texas's General Definitions in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. *See* 30 TAC 116.10(1), (2), (11)(E), and (16), respectively. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Qualified Facilities Program are not severable from each other.

In the September 23, 2009, EPA also proposed to take action on revisions to the SIP submitted by Texas that relate to the General Definitions in Chapter 116. EPA

proposed to approve three of these submitted definitions, "grandfathered facility," "maximum allowable emissions rate table (MAERT)," and "new facility" at 30 TAC 116.10(8), (10), and (12), respectively. These definitions are severable from the Qualified Facilities Program.

EPA proposed to make an administrative correction to the severable submittal for the SIP-approved definition of "facility" under 30 TAC 116.10(6). Consistent with our proposal, EPA is finalizing this administrative correction in today's action. Specifically, EPA corrects a typographical error at 72 FR 49198 (August 28, 2007), to clarify that the definition of "facility," as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48465.

See Sections I and IV for further information on EPA's final action on the above submittals.

Further, EPA proposed to disapprove the following severable definitions: (1) the submitted definition of "best available control technology (BACT)" and (2) subparagraphs (A) and (B) of the submitted definition of "modification of existing facility," which are severable from the other submissions but not severable from each other, and (3) subparagraph (G) of the submitted definition of "modification of existing facility." EPA proposed to take no action on the severable submitted subparagraph (F) for the SIP-approved severable definition of "federally enforceable" under 30 TAC

116.10(7) because the submitted paragraph relates to a federal program that is implemented separately from the SIP. In addition, EPA proposed to take no action on the severable submitted portion of a provision at 30 TAC 116.116(f) that includes, among other things, a trading provision containing a cross-reference that no longer is in Texas's rules. See Section II for further information on why EPA is not taking final action today on these submittals.

B. Summary of the Submittals Addressed in this Final Action

Table 1 below summarizes the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this action is discussed in Sections IV through VI of this preamble. The Technical Support Document includes a detailed evaluation of the submittals.

Table 1. Summary of each SIP submittal that is affected by this action.

Section	Title	Submittal dates	Description of Change	Proposed Action
30 TAC 116.10	General Definitions			
30 TAC 116.10(1)	Definition of "actual emissions"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (1)	
30 TAC 116.10(2)	Definition of "allowable emissions"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (2)	
		9/11/2000	Revised paragraphs (2)(A) through (D)	

30 TAC 116.10(6)	Definition of "facility"	3/13/1996	Added new definition	Administrative correction to clarify the definition of "facility" is in the SIP.
		7/22/1998	Repealed and a new definition submitted as paragraph (4). Approved 9/6/2006 (71 FR 52698)	
		9/4/2002	Redesignated to paragraph (6). Inadvertently identified as non-SIP provision in 8/28/2007 SIP revision.	
30 TAC 116.10(8)	Definition of "grandfathered facility"	3/13/1996	Added new definition	Approval.
		7/22/1998	Repealed and a new definition submitted as paragraph (6)	
		7/31/2002	Revised definition	
		9/4/2002	Redesignated to paragraph (8)	
30 TAC 116.10(10)	Definition of "maximum allowable emission rate table"	3/13/1996	Added new definition	Approval
		7/22/1998	Repealed and a new definition submitted as paragraph (8)	
		9/4/2002	Redesignated to paragraph (10)	
30 TAC 116.10(11)	Definition of "modification of existing facility"	3/13/1996	Added new definition	Disapproval of subparagraph (E)
		7/22/1998	Repealed and a new definition submitted as paragraph (9)	
		9/4/2002	Redesignated to paragraph (11)	
30 TAC 116.10(12)	Definition of "new facility"	3/13/1996	Added new definition	Approval.
		7/22/1998	Repealed and a new definition submitted as paragraph (10)	
		9/04/2002	Redesignated to paragraph (12)	
30 TAC 116.10(16)	Definition of "qualified facility"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (14)	
		9/4/2002	Redesignated to paragraph (16)	
30 TAC 116.116	Changes to Facilities	3/13/1996	Added subsection (e)	Disapproval.
		7/22/1998	Repealed and a new 116.116(e) submitted	Disapproval.
30 TAC 116.117	Documentation and Notification of Changes to Qualified Facilities	3/13/1996	Added new section	Disapproval.
		7/22/1998	Repealed and a new 116.117 resubmitted	
30 TAC 116.118	Pre-Change Qualification	3/13/1996	Added new section	Disapproval.
		7/22/1998	Repealed and a new 116.118 submitted	

C. Other Proposed Relevant Actions on the Texas Permitting SIP Revision Submittals

The Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex), as amended, currently provides that EPA will take final action on the State's Public Participation SIP revision submittal on October 29, 2010. EPA intends to take final action on the submitted Texas Flexible Permits State Program by June 30, 2010, and the NSR SIP by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in BCCA Appeal Group v. EPA, Case No. 3:08-cv-01491-N (N.D. Tex).

Additionally, EPA acknowledges and appreciates that TCEQ is developing a proposed rulemaking package to address EPA's concerns with the current Qualified Facilities rules. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of the current Qualified Facilities program, and we have concluded that the current program is not approvable for the reasons set out in this notice.

IV. What are the Grounds for this Disapproval Action of the Texas Qualified Facilities Program?

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities, identified in the above Table 1. Sources are reminded that they remain subject to the requirements of the Federally- approved

Texas SIP and may be subject to enforcement actions for violations of the SIP. *See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, (March 1, 1991). However, because the Qualified Facilities Program is a permitting exemption, not a permit amendment, this final disapproval action does not affect Federal enforceability of Major and Minor NSR SIP permits.

The provisions affected by this disapproval action include regulatory provisions at 30 TAC 116.116(e), 116.117, and 116.118; and definitions at 30 TAC 116.10(1), (2), (11)(E), and (16) under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA finds that these submitted provisions and definitions in the submittals affecting the Texas Qualified Facilities Program are not severable from each other. Specifically, EPA is making the following findings and taking the following actions as described below:

A. Why the Qualified Facilities Program Submittal is Unclear Whether It Is for a Major or Minor NSR SIP Revision

While the TCEQ and other commenters asserted that the program was intended to be limited to Minor NSR, we continue to be concerned that the program is not explicitly limited to Minor NSR. Specifically, EPA finds that the submittals contain no applicability statement or regulatory provision that limits applicability to minor modifications. The Program is analogous to two other Minor NSR programs in Texas's

SIP because although they do not exempt facilities from NSR, as does the Qualified Facilities Program, they do exempt facilities from obtaining source-specific (i.e., case-by-case) permits. However, both of the State's other Minor NSR programs include an applicability statement and a regulatory provision that expressly limits applicability to minor modifications.[3] Moreover, the Texas Clean Air Act clearly prohibits the use of these two other Minor NSR programs for Major NSR. *See* Texas Health and Safety Code 382.05196 and .057. Therefore, the absence of these provisions in the Qualified Facilities rules creates an unacceptable ambiguity in the SIP. Without a clear statement of applicability of the Program, the Program as submitted is confusing to the public, regulated sources, government agencies, or a court, because it can be interpreted as an alternative to evaluating the new modification as a major modification under Major NSR requirements. Because of the overbroad nature of the regulatory language in the State's SIP revision submittal, we find that the State has failed to limit its submitted Program only to Minor NSR. See 74 FR 48450, at 48456-48457 and Section V.E.1 below for further information.

Consequently, we evaluated this submitted Program as being a substitute for the Texas Major NSR SIP. We also evaluated it for approvability as a Minor NSR SIP. Accordingly, we evaluated whether the submitted Program meets the requirements for a Major NSR SIP revision, the general requirements for regulating construction of any stationary sources contained in Section 110(a)(2)(C) of the CAA, and the applicable

[3] The Standard Permits rules require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b).

statutory and regulatory requirements for an approvable SIP revision. *See* 74 FR 48450, at 48457.

B. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Substitute Major NSR SIP Revision

EPA finds that the State failed to submit information sufficient to demonstrate that the submitted Program's regulatory text explicitly prevents the circumvention of Major NSR. Therefore, EPA is disapproving the Program as not meeting the Major NSR SIP requirements to prevent circumvention of Major NSR. See 74 FR 48450, at 48458; Sections V.C.2. and E. below for further information.

EPA finds that that the State failed to submit information sufficient to demonstrate that the submitted Program's regulatory text requires an evaluation of Major Source NSR applicability before a change is exempted from permitting. Therefore, EPA is disapproving the Program as not meeting the Major NSR SIP requirements that require the Major NSR applicability requirements be met. See 74 FR 48450, at 48458; Section V.C.2 below for further information.

We find that the Program is deficient for Major NSR netting for two main reasons. First, the Program may allow an emission increase to net out by taking into account emission decreases outside of the major stationary source and, in other

circumstances, allow an evaluation of emissions of a subset of units at a major stationary source. Therefore, the Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power v. Costle*, 636 F.2d 323, 401–403 (D.C. Cir. 1980) and *Asarco v. EPA*, 578 F.2d 320 (D.C. Cir. 1978). 74 FR 48450, at 48458-48459; Section V.C.1 below. Second, the Program authorizes existing allowable emissions, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables is inconsistent with the requirements of the Act for Major NSR and is contrary to *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) ("New York I"). 74 FR 48450, at 48459; Section V.C.1 below.

EPA finds that it lacks sufficient available information to determine, pursuant to section 110(l) that the requested relaxation to the Texas NSR SIP would not interfere with any applicable requirement concerning attainment and RFP, or any other applicable CAA requirement. See 74 FR 48450, at 48459 for further information.

C. Why the Submitted Texas Qualified Facilities Program Is Not Approvable as a Minor NSR SIP Revision

EPA finds that the Program is not clearly limited to Minor NSR. The submitted Program also does not prevent circumvention of the Major NSR SIP requirements. The Program lacks requirements necessary for enforcement of the applicable emissions limitations, including a permit application and issuance process. Overall, the Program

fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected. Furthermore, the Program provides a *de minimis* exemption from the Texas Minor NSR SIP, and therefore, it is a SIP relaxation, which creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks sufficient information to determine that this SIP relaxation would not interfere with these requirements. 74 FR 48450, at 48463. Additionally, the legal test for whether a *de minimis* threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)-(b). 74 FR 48450, at 48460. The State failed to demonstrate that this exemption will not permit changes that will violate the Texas control strategies or interfere with NAAQS attainment. Therefore, we are disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(l) of the Act and 40 CFR 51.160.

The Qualified Facilities Program does not ensure protection of the NAAQS and prevent violations of any State control strategy. First, the Program fails to ensure that all participating Qualified Facilities must have obtained a Texas NSR SIP permit. Without the assurance that all Qualified Facilities have obtained a Texas NSR SIP permit, EPA cannot determine that all Qualified Facilities must have Federally enforceable emission limitations based on the chosen control technology, and that the Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any control strategy. Therefore, EPA finds that the Qualified Facilities Program is inadequate to

ensure that all Qualified Facilities have an appropriate allowable limit to prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. See Section V.G.1 for further information. In addition, the Program does not require the owner or operator to maintain the information and analysis showing how it concluded that there will be no adverse impact on ambient air quality before undertaking the change. Therefore, EPA finds that the Qualified Facilities Program is inadequate to ensure that all changes under the Program that are exempted from permitting will not prevent interference with attainment and maintenance of the NAAQS or violations of any State control strategy that is required by the Texas NSR SIP. 74 FR 48450, at 48462; Section V.F.1.

Regarding the State's use of minor source netting in the Qualified Facilities Program, EPA makes the following findings:

The Qualified Facilities Program is inadequate because it fails to provide clear and enforceable requirements for a basic netting program. Therefore, this Program, as submitted, does not meet the fundamental requirements for an approvable Minor NSR netting program. To analyze the Program's Minor NSR netting for approvability, we used the fundamental principles of Major NSR and NSR netting because these principles are designed to ensure that there is no interference with the NAAQS and control strategies.[4] The Major NSR netting program requires the following: (1) An identified

[4] However, our analysis of the netting provisions in the Qualified Facilities Program under Minor NSR is not intended to create a binding Agency position on evaluating the approvability of Minor NSR netting.

contemporaneous period, (2) the reductions must be contemporaneous and creditable, (3) the reductions must be of the same pollutant as the change, (4) the reductions must be real, (5) the reductions must be permanent, and (6) the reductions must be quantifiable. *See* 40 CFR 51.165(a)(1)(vi) (the definition of ‘‘net emissions increase”); 40 CFR 51.166(b)(3). To be considered creditable, the reduction’s old level of emissions must exceed the new level of emissions, the reduction must be enforceable as a practical matter at and after the time the actual change begins, and the reduction must have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. *See* 74 FR 48450, at 48461.

As discussed below, the Program’s netting provisions do not meet all of the requirements; therefore, the Qualified Facilities netting is disapproved as a Minor NSR netting program.

- The Program fails to define a contemporaneous or other period for the netting and that the emission reductions must occur within that specified period. 74 FR 48450, at 48461; Section V.C.1 below.
- Emissions reductions under the Qualified Facilities program are not enforceable as a practical matter at and after the time of the actual change begins; and therefore, not sufficiently creditable. First, the Program fails to ensure a separate netting analysis is performed for each proposed change because the rules are not clear that reductions can only be relied upon once. Therefore, we find that that the Program fails to prevent double counting; and consequently these types of reductions are not

creditable. Second, the Program does not require that each Qualified Facility involved in the netting transaction must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. As a result, emissions reductions are not enforceable; and therefore, not sufficiently creditable. 74 FR 48450, at 48462; Section V.C.1.

- EPA proposed to find that the State's "interchange" methodology, submitted 30 TAC 116.116(e)(3), is consistent with the Federal requirement that reductions must be of the same pollutant as the change.[5] 74 FR 48450, at 48461. However, after evaluation of received comments, EPA finds that the term "sulfur compounds" in 30 TAC 116.116(e)(3)(F), is broad enough to include hydrogen sulfide. Hydrogen sulfide is a regulated NSR pollutant (*see* 40 CFR 52.21(b)(23)(i) and 52.21(i)(5)(i)) and, in certain instances, may require separate analysis from sulfur oxides in a netting analysis. Therefore, the interchange methodology may not ensure the health impacts of all sulfur compounds will be equal. The State failed to demonstrate that such use of hydrogen sulfide would protect the sulfur dioxides NAAQS. Additionally, this provision allows PM-2.5 to be interchanged with PM-10. However, because PM-10 and PM-2.5 are two separate pollutants and the State failed to demonstrate that such use of PM-10 would protect the PM-2.5 NAAQS, this

[5] See 40 CFR 51.165(a)(1)(vi)(A) and 51.166(b)(3)(i), which define net emissions increase "with respect to *any regulated NSR pollutant*." Emphasis added.

interchange is inappropriate. Therefore, this provision is unapprovable for the sulfur dioxides and PM NAAQS. Section V.C.1 below.

- The Program also lacks any provisions that require the reductions to be permanent. Specifically, the submitted Program does not include provisions that either prohibit future increases at the Qualified Facility, or ensure that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS remains protected from the original increase. 74 FR 48450, at 48461; Section V.C.1 below.

Section 30 TAC 116.117(b) lacks any provisions that require a permit application to be submitted to TCEQ for a change under the Program. There are no provisions in 30 TAC 116.117(b) that clearly indicate that TCEQ must issue a revised permit for the changes made by all of the participating Qualified Facilities. Thus, EPA finds that the Program is not approvable because it lacks this requirement and therefore is not enforceable. *See* 74 FR 48450, at 48462, Section V.D.1 below.

The Qualified Facilities SIP submittal is a relaxation under CAA section 110(l) because it provides an exemption from NSR permitting not previously available to facilities. As such, this revision creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks information sufficient to make a determination that the requested SIP revision relaxation does not interfere with any

applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l). *See* 74 FR 48450, at 48463.

For the reasons discussed above in this section and as further discussed below in Section V (Response to Comments), EPA is disapproving the submitted Qualified Facilities Program as not meeting section 110(a)(2)(C) and 110(l) of that Act and 40 CFR 51.160. *See* 74 FR 48450, at 48462.

D. Definition of "facility"

EPA proposed to make an administrative correction to the severable submittal for the SIP-approved definition of "facility" under 30 TAC 116.10(6). Consistent with our proposal, EPA is finalizing this administrative correction in today's action. Specifically, EPA corrects a typographical error at 72 FR 49198 to clarify that the definition of "facility," as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48465.

However, EPA wishes to note that each part of the Texas NSR program depends greatly upon the definition of "facility" that is applicable to it and upon how that definition is used in context within each part of the program. There are instances where a specific part of the Texas NSR program does not meet the Act and EPA regulations due to the definition of "facility" that applies to that part of the program. For example

Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," but the NNSR non-PAL rules fail to include such a limitation. 74 FR 48450, at 48475; *compare* 30 TAC 116.10(6) *to* 30 TAC 116.160(c)(3). TCEQ did not provide information to demonstrate that the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. 74 FR 48450, at 48455; Section V.M. below.

V. Response to Comments

In response to our September 23, 2009, proposal, we received comments from the following: Sierra Club – Houston Regional Group; Sierra Club Membership Services (including 2,062 individual comment letters); Harris County Public Health and Environmental Services; Texas Commission on Environmental Quality; Members of the Texas House of Representatives; Office of the Mayor – City of Houston, Texas; University of Texas at Austin School of Law – Environmental Clinic; Baker Botts, L.L.P., on behalf of BCCA Appeal Group; Baker Botts, L.L.P., on behalf of Texas Industrial Project; Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council; Gulf Coast Lignite Coalition; Texas Chemical Council.

A. General Comments

1. Comments generally supporting proposal.

Comment: Harris County Public Health & Environmental Services (HCPHES) acknowledges that EPA takes issue with the TCEQ regulations because of the lack of specificity regarding definitions and general lack of checks and balances to ensure that Federal requirements are met during the State's permitting processes, and because they do not meet the Minor NSR SIP and Major NSR SIP, including the Major NSR Nonattainment SIP requirements. Those concerns, currently unaddressed by the TCEQ, have ultimately resulted in EPA's proposed disapproval of portions of the TCEQ's most recent SIP submittal. HCPHES views a TCEQ program that meets the Federal requirements as being critical to ensuring that air quality in the Houston Galveston Brazoria (HGB) area returns to levels compliant with the NAAQS. HCPHES is very concerned that the TCEQ programs fall short of Federal requirements and encourages EPA to aggressively pursue the timely correction of these deficiencies to ensure the health, safety, and well being of the citizens of Harris County. HCPHES supports EPA's conclusion to disapprove portions of the SIP as proposed until such time as TCEQ addresses all of the specifics noted in the Federal Register.

Comment: Several members of the Texas House of Representatives support EPA's proposed disapproval of the Qualified Facilities Program. While the Qualified Facilities Program was a legislative creation, these members of the Texas House recognize that the statutory language and associated regulations are inconsistent with current CAA requirements regarding modifications and public participation. Particular concerns are:

- *Inadequate TCEQ oversight.* The rules authorize many changes at facilities without any pre-approval by TCEQ or procedures for denial for cause. These off-

permit changes are difficult to track and enforce and may threaten ambient air quality.

- *The lack of understandable and traceable permits.* Texas industry, regulators, and the public should be able to obtain a permit, read it, and know what quantity of what pollutants the facility is authorized to emit. The off-permit changes authorized through the Qualified Facilities rules prevent such transparency.

Comment: Houston Regional Group of the Sierra Club (Sierra Club) supports EPA's analysis and agrees that all of the September 23, 2009, proposals (including the Qualified Facilities Program) should be disapproved. The commenter generally supported EPA's proposed disapproval of the Qualified Facilities Program; Flexible Permits Program; and Texas Major and Minor NSR SIP for 1997 8-hour and 1-hour ozone NAAQS, Prevention of Significant Deterioration (PSD) SIP, and Standard Permit for Pollution Control Projects. The commenter provided additional comments on our proposed disapproval of the Flexible Permits Program, which EPA will address in its separate action on the Flexible Permits Program.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as discussed in detail at 74 FR 48450, at 48455-48463, and further support EPA's action to disapprove the Qualified Facilities submission.

Comment: The Sierra Club Membership Services (SCMS) sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters (sent via e-mail), which included the following comments:

- The TCEQ is broken and the commenters applaud EPA's proposed ruling that major portions of the TCEQ air permitting program does not adhere to the CAA and should be thrown out;
- While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions as follows:
  - Halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy;
  - Creating a moratorium on the operations of any new coal fired power plants in Texas until TCEQ cleans up its act by operating under the Federal CAA;
  - Requiring coal companies clean up their old, dirty plants – no exceptions, no bailouts, and no special treatment – by reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and
  - Put stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.
- The commenters further state that Texas: (1) Has more proposed coal and pet coke fired power plants than any other state in the nation; (2) Is number 1 in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years.

- The commenters do not want coal to stand in the way of a clean energy future in Texas. Strong rules are needed to make sure the coal industry is held responsible for their mess and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments. These additional comments include the following:

- Commenters suggest that Texas rely on wind power, solar energy, and natural gas as clean alternatives to coal.
- Other comments expressed general concerns related to: impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts of upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns.

Response: To the extent the SCMS letters comment on the proposed disapproval of the Qualified Facility program, they support EPA's action to disapprove the Qualified Facilities submission. The remaining comments are outside the scope of our proposed action relating to the Qualified Facilities Program.

Comment: The Environmental Clinic, the University of Texas at Austin School of Law (UT Environmental Clinic) commented that EPA should disapprove several other sections of 30 TAC Chapter 116.

Response: This final rulemaking only addresses the Qualified Facilities Program. Therefore, issues related to other portions of Texas's regulations are outside the scope of this rulemaking.

2. Comments generally opposing proposal.

Comment: TCEQ provided several general comments on the proposal. The TCEQ commented that the Qualified Facilities Program was developed by the 74th Texas Legislature through Senate Bill (SB) 1126, which became effective May 19, 1995. SB 1126 amended the Texas Clean Air Act by revising the definition of "modification of existing facility," which changed the factors used to determine whether a modification for State permitting (i.e. Minor NSR) has occurred. In 1996, 30 TAC Chapter 116 was revised to incorporate this legislative directive. These changes provide that modifications may be made to existing facilities without triggering the State's Minor NSR requirements whenever: (1) the facility to be modified has received a permit, permit amendment, or has been exempted from permitting requirements no earlier than 120 months from when the change will occur; or (2) uses air pollution control methods that are at least as effective as the Minor NSR SIP best available control technology (BACT) that the

Commission required 120 months before the change will occur. Such facilities are designated as "qualified facilities."

TCEQ has always considered the Qualified Facilities Program to be applicable only to Minor NSR and not applicable to Major NSR, although this is not specifically stated in the rule. In summary, under the Qualified Facilities Program, TCEQ: (1) determines Federal applicability as a first step in processing a Qualified Facilities request; and uses actual emissions, not allowable emission rates; (2) applies Federal NSR requirements when triggered; (3) does not circumvent Federal requirements applicable to major stationary sources or major modifications; (4) considers the use of "modification" to be separate and severable from the Federal definition of "modification" as reflected in the SIP-approved Major NSR Program; and (5) does not violate the approved SIP with regard to Major NSR or Minor NSR Program requirements.

Comment: The Texas Chemical Council (TCC) comments that it would be short-cited to analyze the three programs (Qualified Facilities, Flexible Permits, and NSR Reform) apart from the dramatic improvements in the air quality in Texas in the past 15 years. TCC goes on to describe these improvements. TCC supports full approval of Qualified Facilities. The Qualified Facilities Program is not intended to shield a source from major NSR. The Program is a robust, Federally enforceable program. The Qualified Facilities Program is authorized by the TCAA, promotes flexibility, and allows sources to make certain changes without triggering NSR. If Major NSR is triggered, a facility cannot be a Qualified Facility. The definition of a Qualified Facility makes it

clear that a Qualified Facility is an existing facility. A Qualified Facility may make a physical change in or change the operation of that facility as long as the change does not result in a net increase in allowable emissions of any air contaminant and does not result in the emission of any air contaminant not previously emitted. Additionally, the facility must be using equipment at least as effective as the BACT required by TCEQ. TCC supports full approval of the three Texas air permitting program submittals. The SIP revisions submitted to EPA by TCEQ over the last 15 years are critical components to Texas air permitting program. Texas should not be punished for EPA's failure to act within the statutory timeframe in the CAA. EPA offers little or no legal justification for proposing disapproval of these programs. EPA's proposed action will have an enormous impact on the country's largest industrial state. The SIP revision submittals for these programs are at least as stringent as the applicable Federal requirements and should be fully approved.

Comment: Bracewell & Giuliani LLP, counsel to the Electric Reliability Coordinating Council (ERCC), commented that Qualified Facilities provides incentives to implement pollution reduction measures at existing facilities. EPA's proposed disapproval does not provide any evidence that this authorization is actually used for major modifications or in fact interferes with air quality improvements. Discontinuance of this program could deter or delay many pollution reduction measures because the cost and resources associated with a full notice and comment case-by-case permit would outweigh the economic benefits of the additional controls. EPA should determine that the Qualified Facilities Program satisfies the CAA requirements for a state minor source

program and retract the SIP disapproval and approve this SIP revision. EPA should recognize the validity of permits issued under the Texas permitting program and refrain from taking enforcement actions to address EPA concerns.

Comment: Jackson Walker, LLP, counsel to Gulf Coast Lignite Coalition GCLC, provided the following general comments on all three proposed disapprovals (Qualified Facilities, Flexible Permits, and NSR Reform): (1) Commenters disagree with all the proposed disapprovals because the SIP as implemented by TCEQ meets or exceeds CAA requirements and has met the goals of the CAA; (2) EPA has a history of focusing on results; so, EPA should look beyond immaterial differences in the rule provisions and focus on the positive results that Texas has achieved under the TCAA and the State's submittals; (3) Texas sources have relied on the submitted rules for as long as 15 years in some cases. To disapprove the submittals after so long puts too much burden on the regulated community, creates regulatory uncertainty, hurts the vulnerable economy by potentially increasing compliance costs, and may discourage future business expansion; and (4) GCLC requests that EPA work collaboratively, not combatively, with TCEQ to resolve any issues under the CAA.

Comment: Baker Botts, LLP, counsel for Texas Industry Project (TIP) and Business Coalition for Clean Air (BCCA) provided the following comments. TIP and BCCA support full approval of Qualified Facilities because the submittal will strengthen Texas's permitting program. EPA should work expeditiously with TCEQ to approve the Qualified Facilities Program. Further, under Texas's integrated air permitting regime, air

quality in the state is demonstrating strong, sustained improvement. Commenters describe the air quality improvements in Texas in the recent past. Finally, commenters describe their understanding of how the Qualified Facilities Program operates. Qualified Facilities is a Minor NSR applicability trigger that allows existing emissions facilities that employ BACT to make changes without Minor NSR review as long as the changes do not result in net emissions increases. The Qualified Facilities Program is authorized by the TCAA and applies only to existing facilities. The term "facility" is analogous to the Federal definition of "emissions unit," under Texas's Title V program. *See* 30 TAC 122.10(8). The Texas Legislature created the Qualified Facilities Program as an incentive for sites to implement BACT. To be "qualified," the source must 1) have a permit or permit amendment or exempt from pre-construction permit requirements no earlier than 120 months before the change will occur, or 2) use air pollution control methods that are at least as effective as the BACT that was required or would have been required for the same class or type of facility by a permit issued 120 months before the change will occur. *See* 30 TAC 116.116(e). A qualified facility may lose its status as "qualified" if its permit, exemption, or control method falls outside the 10-year window. *See* TEXAS NAT'L RES. CONSERVATION COMM'N, *Modification of Existing Facilities under Senate Bill 1126: Guidance for Air Quality*, (April 1996), 5 [hereinafter *Modification of Existing Facilities Guidance*].

Comment: Texas Oil & Gas Association (TxOGA) is encouraged that EPA is taking action to provide certainty in the regulatory process for businesses. TxOGA supports the ongoing goal of improved air quality; however, commenters do not believe

that the proposed disapproval does anything to improve air quality in Texas. Further, the proposal may discourage future business expansion in Texas.

Response: EPA understands TCEQ's explanation of the origination of the Program in SB 1126. Nonetheless, the Qualified Facilities Program must meet all Federal requirements under the CAA in order to be approvable. The fact that EPA failed to act on the Qualified Facilities Program SIP revision within the statutory timeframe does not dictate the action EPA must take on the Program at this time. We cannot approve a program that fails to meet the requirements of the CAA. As discussed throughout our proposal and this final notice, the current Qualified Facilities Program fails to meet all requirements. We disagree with commenters that the Qualified Facilities Program is exclusively a Minor NSR program, based upon the ambiguities in the Program's rules. Furthermore, EPA need not prove that the Program is actually used for major modifications. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); Natural *Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995); *American Cyanamid v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987). This includes an analysis of the submitted regulations for their legal interpretation. The Program's rules are ambiguous and therefore do not adequately prohibit use under Major NSR. We recognize that TCEQ considers the Program to be a Minor NSR Program; however, the State admits that its rules are insufficient to limit the Program to Minor NSR. See 74 FR 48450, at 48456-48457; Section V.F. below for further information.

EPA enforcement of Federal requirements in Texas is outside the scope of this rulemaking. Additionally, comments on the Flexible Permits Program and the NSR Reform submittal are outside the scope of this notice. EPA will address the comments on its proposed disapprovals of Flexible Permits and NSR Reform in separate actions on these programs.

B. Comments that this Action is Inconsistent with the CAA

Comment: ERCC commented that EPA's proposed disapprovals are not rationally supported by case law and are inconsistent with the CAA. Congress placed primary responsibility for developing SIPs on the states, so permitting programs among states can vary greatly. EPA determines whether the state SIP satisfies the minimum requirements of the CAA. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), *rehearing denied* 429 U.S. 873 (1976); *Train v. NRDC*, 421 U.S. 60 (1975); *Florida Power and Light Co. v. Costle*, 650 F.2d 586 (5th Cir. 1979); 71 FR 48696, 486700 (August 21, 2006) (Proposed rule to promulgate a FIP under the CAA for tribes in Indian country). The Fifth Circuit Court of Appeals recently stated that "EPA has no authority to question the wisdom of a State's choice of emission limitations if they are part of a SIP that otherwise satisfies the standards set for in 42 U.S.C. 7410(a)(2)." *Clean Coalition v. TXU Power*, 536 F.3d 469 Fn.3 (5th Cir. Tex. 2008). Texas's permitting programs are based on the recognized Minor NSR flexibility and consistent with prior EPA approvals of other state SIPs. EPA must review other approved state programs to ensure that Texas's sources are not put at a competitive disadvantage. *See* Memorandum from John

Seitz, Director, OAQPS, *SIP Consistency Process* (April 4, 10 1996). EPA's proposed disapprovals could have dramatic impact on industries in Texas. EPA should solicit comments from all EPA regions on whether the proposed actions are inconsistent with other state SIPs and compare the stringency of the Texas programs to those of other states. ERCC is confident that EPA will realize that the Texas programs are consistent and possibly more stringent than other permitting programs throughout the country.

Response: EPA continues to recognize that permitting programs among states can vary greatly and provide some flexibility for Minor NSR SIP programs. However, in order to be approved as part of the SIP, the Qualified Facilities Program must meet all applicable Federal requirements. Here, the commenter's reliance on the Fifth Circuit's dicta in *Clean Coalition* is misplaced because the Qualified Facilities Program does not meet the standard set in 42 U.S.C. 7410(a)(2)(C). Section 42 U.S.C. 7410(a)(2)(C) requires the State to have a permitting program that complies with PSD and Nonattainment New Source Review (NNSR) permit requirements (at 42 U.S.C. 7475 and 7503, respectively), as well as Minor NSR permit requirements. As part of the State's permitting program, the Qualified Facilities Program fails to meet these requirements of the Act. As discussed throughout our proposal and this final action, the submitted Program fails to meet all requirements for an approvable permitting program, including submitting information sufficient to demonstrate that the Program is restricted only to Minor NSR. Commenters argue that the Qualified Facilities Program is consistent with other SIP approved programs; however, they fail to cite any specific examples.

C. Comments Addressing Whether the Qualified Facilities Rules Allow Sources to "Net Out" of Major and Minor NSR through Rules that Are Not Adequate to Protect the NAAQS and State Control Strategies

1. Comments generally supporting proposal.

Comment: UT Environmental Clinic commented that the Qualified Facilities Program fails to meet the netting requirements for several reasons. The commenter notes that the Qualified Facilities Program netting calculations can be based on allowable emissions. Allowables netting violates Major NSR because it is inconsistent with *State of New York v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005) and violates the CAA; it violates Minor NSR because it fails to require an evaluation of the actual emissions impacts on maintenance of the NAAQS.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program as discussed in detail at 74 FR 48450, at 48459, and further support EPA's action to disapprove the Qualified Facilities submission.

We find that the Program authorizes existing allowable, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables violates the Act for Major NSR SIP requirements and is contrary to *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) ("New York I"). 74 FR 48450, at 48459. Under the

submitted Program, the project's increases in emissions are calculated based upon its projected allowable emissions. The baseline uses the permitted allowable emission rate (lowered by any applicable state or Federal requirement) if the facility "qualified" under 30 TAC 116.10(11)(E)(i). If the facility "qualified" under 30 TAC 116.10(11)(E)(ii), the baseline uses the actual emission rate (minus any applicable state or Federal requirement). In the applicability netting analysis, the baseline for all the other participating minor and major existing Qualified Facilities is calculated in the same way. The emission reductions are calculated similarly, i.e., reductions beyond the permitted allowable or actual emission rates (minus the applicable state and Federal requirements). Thus, this submitted Program allows an evaluation using allowable, not actual emissions, as the baseline to calculate the project's proposed emission increase and for many of the netting emission reductions, thereby in many cases possibly circumventing the major modification applicability requirements under the Major NSR rules. Therefore, the Program fails to meet the CAA and Major NSR requirements to use baseline actual emissions for major source netting as the starting point from which the amount of creditable emission increases or decreases is determined. 74 FR 48450, at 48459.

EPA agrees that the reductions in the Program's netting are not based on actual emissions. Such netting may be permissible for a Minor NSR Program; *provided* that the netting provisions assure protection of the NAAQS and the SIP control strategies as required by section 110(a)(2)(C) of the CAA. Allowables netting is acceptable because CAA section 110(a)(2)(c) does not explicitly prohibit the use of allowables netting for Minor NSR programs. However, Texas failed to submit sufficient information to

demonstrate that the use of allowable emissions in a Minor NSR netting program continues to protect the NAAQS and control strategies; therefore, EPA cannot determine if this requirement is met. Today's rulemaking disapproves netting under the Qualified Facilities Program as a Minor NSR program, in part because the Program fails to ensure that ambient air is protected in consideration of all changes in the netting.

Comment: UT Environmental Clinic commented that the definitions in section 116.10 do not adequately specify how to calculate emissions reductions for purposes of the netting analysis. For example, the Texas definition of actual emissions is the "highest rate" actually achieved within the past 10 years. It is unclear whether this is the highest emission rate achieved at a single point in time or averaged over some period.

Response: We disagree that the reductions are not quantifiable. The netting is based on the most stringent of the permitted emissions rate (which includes the highest achievable actual emission rate) or any applicable state or Federal rule. Nothing in the State's definition of "actual emissions" implies at all that there is any averaging involved in the calculations. The reduction is based upon the highest rate the facility achieved at a single point in time, looking back the past 10 years.

While we proposed to find that the reductions were quantifiable, we requested comments on two aspects of the Program as it relates to this principle. 74 FR 48450, at 48461-48462. First, we requested comment on whether the regulatory provisions at 30 TAC 116.10(1) and (2) provide clear direction on the appropriate calculation procedures

sufficient to ensure the reductions are quantifiable. As stated above, we disagree with the commenter's argument that the definitions in section 116.10 do not adequately specify how to calculate emissions reductions for purposes of the netting analysis.

Second, the submitted rules provide that a Qualified Facility nets its emissions increase on the same basis as its allowable emissions limitation. 30 TAC 116.116(e)(3)(A). We requested comment on whether netting on such a basis is sufficiently quantifiable, and whether any additional provisions are necessary to ensure that the entire emissions increase is properly netted against reductions from the other Qualified Facility. We did not receive any comments on this second aspect of quantifiability under the Program. Because no comments were submitted showing the basis was not sufficiently quantifiable, we continue to believe that netting for a Minor NSR SIP program on the adequacy of the Program's netting of emissions increases on the same basis as its allowable emissions limitation, is sufficiently quantifiable.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules allow all emission reductions at the same account number to be considered in the net emission calculation. In fact, the rules could be read to allow the "offsetting" of emissions above allowables by decreases in emissions at any "different facility." 30 TAC 116.110(3). Because an account number can include multiple sources, the Texas rules allow consideration of emission decreases from outside the major stationary source in violation of 42 U.S.C. 7411(a).

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program as discussed in detail at 74 FR 48450, at 48458-48459, and further support EPA's action to disapprove the Qualified Facilities submission.

We find the Program is deficient for Major NSR netting because it may allow an emission increase to net out by taking into account emission decreases outside of the major stationary source[6] and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source.[7] The State failed to submit information sufficient to demonstrate that the Program includes the necessary replicability and accountability to prevent such circumvention. Therefore, the Program does not meet the CAA's definition of "modification" and the Major NSR SIP requirements and is inconsistent with *Alabama Power v. Costle*, 636 F.2d 323, 401–403 (D.C. Cir. 1980) and *Asarco v. EPA*, 578 F.2d 320 (D.C. Cir. 1978). 74 FR 48450, at 48458-48459.

Comment: UT Environmental Clinic commented that the Qualified Facilities netting rules only allow consideration of the increase in allowable emissions from the Qualified Facility undergoing a change, but consider the decreases from any other Qualified Facilities at the same account number. There is no consideration of all the emission increases so there is no adequate impacts analysis from the source.

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[6] The Texas SIP defines an ''account'' to include an entire company site, which could include more than one plant and certainly more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence.

[7] Under the submitted Program, not all emission points, units, facilities, major stationary sources, or minor modifications at the site or their increases in emissions are required to be evaluated in the applicability netting analysis. So the Program fails to require the evaluation of emissions changes at the entire major stationary source correctly as required by the Major NSR SIP regulations. 74 FR 48459.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a substitute for a Major NSR SIP program as discussed in detail at 74 FR 48450, at 48458-48459, and further support EPA's action to disapprove the Qualified Facilities submission.

Major NSR netting is based upon all contemporaneous increases and decreases at the same major stationary source that occur within a reasonable period that the states must define in their approved SIPs. The submitted Program's netting is not based upon all contemporaneous increases at the same major stationary source and not all decreases at the same major stationary source. However, the State contends that the Program is not intended to apply for Major NSR netting but only for Minor NSR netting. Moreover, the Program is not intended to allow contemporaneous netting. Instead, one looks to the increases from the proposed change and to decreases made at the same time as the proposed change. Such an approach, if fully delineated in the State's Program rules, would satisfy the minimum requirements for an approvable Minor NSR netting program *provided* that the ambient air is protected in consideration of all changes in the netting. Today's rulemaking disapproves netting under the Qualified Facilities Program as a Minor NSR program, in part because the Program fails to ensure that ambient air is protected.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules do not define a contemporaneous period nor require that emission reductions occur

within a specified period. EPA notes in the *Federal Register* that Texas intended that any relied-upon reductions occur simultaneously with the increase. However, the commenter argues that nothing in the rule requires this.

Response: We agree with the comment insofar as it asserts that the Program fails to define a contemporaneous period or require that emission reductions occur within a specified period. EPA finds that, while Texas intended that any relied-upon reductions occur simultaneously at the time of the increase,[8] the Program is deficient because it does not expressly define the applicable period in which the reductions must occur. See our response to the previous comment. 74 FR 48450, at 48461.

Comment: UT Environmental Clinic commented that because the Qualified Facilities rules allow reductions to be based upon allowable emissions, they do not ensure that reductions are real.

Response: We disagree that just because the reductions are based upon allowable emissions, these reductions are not real. For example, reviewing authority may presume that source-specific allowable emissions may be equivalent to the actual emissions. *See* 40 CFR 51.165(a)(1)(xii)(C) and 51.166(b)(21)(iii). The commenter fails to discuss why the use of allowable emissions makes the reductions not real.

Comment: The UT Environmental Clinic commented that the rules fail to ensure that netted reductions are permanent.

[8] See 21 Tex. Reg. 1573 (February 27, 1996).

Response: We agree with the commenter that the Program lacks any provisions that require that the reductions are permanent. For reductions to meet the netting requirement to be permanent, the rules must include a prohibition against future increases at the Qualified Facility, or include regulatory language that assures that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS remains protected from the original increase. However, the submitted Program does not include such provisions. Consequently, the Qualified Facilities rules are inadequate because they fail to ensure that the reductions are permanent.

Comment: UT Environmental Clinic commented that the rules do not prevent double counting of emission reductions.

Response: For an additional *separate* project, it appears that the state intended that the reductions must occur at the time of that *additional* project that will need to obtain additional reductions to net out. If the regulatory text was consistent with this approach, this limitation would prevent double counting of the netting reductions. The State's intent is that the holder of the permit is required to perform a new, separate netting analysis and rely upon reductions not relied upon in the first netting analysis. *See* 74 FR 48450, at 48461 (*citing* 21 Tex. Reg. 1573 (February 27, 1996); page 154 of the 1996 SIP revision submittal). We agree that the rules are not clear that a subsequent change at a Qualified Facility that previously relied upon netting must conduct a separate

netting analysis that relies upon reductions that were not relied upon in the first netting analysis. EPA cannot find any provisions in the Program to ensure a separate netting analysis performed for each proposed change. Therefore, the Program fails to prevent double counting; and consequently these types of netting reductions are not enforceable as a practical matter at and after the time of the actual change begins; and therefore, not sufficiently creditable. 74 FR 48450, at 48461.

Comment: UT Environmental Clinic commented that the Qualified Facilities rules fail to ensure that the emission reductions are enforceable. Facilities provide notice of changes to Qualified Facilities on Form PI-E, which is not enforceable, and Qualified Facility changes that affect permitted facilities are not required to be incorporated into a permit until renewal or amendment. TCEQ noted in its Qualified Facility guidance that the form is not Federally enforceable "but is simply a form to provide information to demonstrate that the change meets qualified facility flexibility." Consequently, Qualified Facility reductions are allowed to remain unenforceable for years. Further, Texas rules make it unclear whether emission reductions are ever made enforceable because a portion of the definition of "allowable emissions" states that "[t]he allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls." 30 TAC 116.10(2)(F). This portion of the definition of "allowable emissions" states that "[t]he allowable emissions for a qualified facility shall not be adjusted by the voluntary installation of controls." Additionally, there are no monitoring requirements in the Qualified Facilities rules to track compliance with commitments to reduce emissions of limitations on emissions increases.

Response: We agree that the Qualified Facilities rules fail to ensure that the emission reductions relied upon in a netting analysis are enforceable. We noted at 74 FR 48450, at 48462 that the rules do not require permits for these relied-upon reductions. We also agree that the Program does not require monitoring because no permit is required for each change. *See* Section V.D.1 below.

We disagree that 30 TAC 116.10(2)(F) makes the rules vague as to enforceability. This provision of the rule is defining how to calculate the baseline from which reductions occur. When calculating the allowable emissions for a Qualified Facility participating in the Program, one cannot count any reductions occurring as a result of the voluntary installation of controls. However, a facility can become "qualified" to use the Program by voluntarily installing controls. The reductions achieved by this voluntary installation of controls are not counted in the Qualified Facility's allowable emissions.

Comment: UT Environmental Clinic states that the Qualified Facilities rules do not ensure that emission reductions have the same health and welfare effects as the emission increase. Because the program allows the emission increase to be offset inside and outside the facility, it allows for emission increases close to the fence line, potentially affecting health and welfare of the surrounding community.

Moreover, the Qualified Facilities Program allows Qualified Facilities to offset emissions increases of one pollutant with emission decreases of another pollutant, as long

as the pollutants are in the same "air contaminant category." The interchange methodology established by TCEQ[9] to ensure that compounds within the VOCs air contaminant category, as interchanged, will have an equivalent impact on air quality, is not included in the Texas rules or statute. The rule merely defines an "air contaminant category" as a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds. 30 TAC 116.116(e)(3)(F). Clearly emissions of all sulfur compounds, say sulfur dioxide and hydrogen sulfide, are not equal in terms of health impacts. Likewise, the health impacts of fine PM emissions are of significantly greater concern than the impacts of larger particles.

Response: With regard to VOCs and nitrogen oxides, EPA disagrees with the comment above that the Program is deficient because the State's rules allow an offset of an emission increase pollutant with emission decrease of another pollutant, as long as the pollutants are in the same "air contaminant category." The State's interchange methodology goes beyond the fundamental principle to determine whether the interchange of different compounds within the same air contaminant category will result in an equivalent decrease in emissions; e.g., one VOC for another VOC; for VOCs and nitrogen oxides. *See* 74 FR 48450, at 48461.

On the other hand, the term "sulfur compounds" in 30 TAC 116.116(e)(3)(F), is broad enough to include hydrogen sulfide. The State failed to demonstrate that use of hydrogen sulfide would protect the sulfur dioxides NAAQS. Therefore, we agree with the commenter that the interchange methodology does not ensure the health impacts of all

[9] See 74 FR 48455, n.3.

sulfur compounds will be equal. With regard to the comment concerning particulate matter, the definition of "air contaminant category" allows PM-2.5 to be interchanged with PM-10. However, because PM-10 and PM-2.5 are two separate pollutants and the State failed to demonstrate that such use of PM-10 would protect the PM-2.5 NAAQS, this interchange is inappropriate. Therefore, we agree that the interchange methodology does not ensure the health impacts of all particulate matter will be equal.

We, however, disagree with the comment above that the Program fails to ensure that emission reductions have the same health and welfare effects as the emission increases. The State has established a methodology to use whenever there is a different location of emissions because of the intraplant trading. For example, where the netting has the effect of moving emissions closer to the plant property line than the Qualified Facility to be changed, the State uses this methodology to analyze whether there could be an increase in off-site impacts. *See* 30 TAC 116.117(b)(5). We continue to believe that this will ensure the reductions have approximately the same qualitative significance for public health and welfare, which is required to ensure the reductions are creditable. Nevertheless, as stated above, we are disapproving the Qualified Facilities netting program as a substitute for a Major NSR SIP program and as a Minor NSR SIP program because the Program is inadequate to protect ambient air quality.

Comment: The UT Environmental Clinic commented that the Qualified Facilities netting Program does not adequately protect air quality under Minor NSR. Specifically, the Qualified Facilities netting provisions do not meet Federal netting standards, which

are in place precisely to ensure that air quality is protected. The Program's failure to meet almost all of those basic netting requirements renders the rules inadequate.

Response: Generally, these comments support EPA's analysis of Texas's Qualified Facilities Program as a Minor NSR SIP program as discussed in detail at 74 FR 48450, at 48460-48462, and further support EPA's action to disapprove the Qualified Facilities submission.

Comment: The UT Environmental Clinic commented that the Program is clearly inadequate to ensure protection of the NAAQS and to prevent violations of control strategies. The rules cannot be approved as an exemption from Minor NSR permitting because they in no way ensure that the emission increases authorized pursuant to the rules will have a *de minimis* impact on air quality.

Response: We agree with the commenter that the Program is inadequate to ensure protection of the NAAQS for several reasons. As discussed below in Section V.G.1, we find that the Qualified Facilities rules are not clear that all Qualified Facilities must have obtained a Texas NSR SIP permit. Without the assurance that all Qualified Facilities have obtained a Texas NSR SIP permit, EPA cannot make the finding that each permit for a Qualified Facility includes an emission limitation based on the chosen control technology, with a determination that the Qualified Facility will not interfere with attainment and maintenance of the NAAQS or violate any control strategy. Therefore, the Program fails to ensure that all Qualified Facilities can operate up to a permitted

allowable limit such that they do not interfere with attainment and maintenance of the NAAQS and do not violate any State control strategy, as required by the Texas NSR SIP.

Additionally, the Program fails to ensure that the NAAQS are protected because 30 TAC 116.117 lacks language requiring the owner or operator to maintain the information and analysis showing how it concluded that there will be no adverse impact on ambient air quality before undertaking the change.

We agree with the commenter that the Program does not qualify as a *de minimis* exemption from Minor NSR. The State has not provided sufficient information to demonstrate that the exempted changes from the Minor NSR requirements will have only a *de minimis* effect. See Section V.D.1 below for more information.

2. Comments generally opposing proposal.

Comment: TCEQ commented that the Qualified Facilities Program can only be used if a physical or operational change complies with Federal NSR requirements. In order to make a physical or operational change to a Qualified Facility, an owner or operator must demonstrate that the change does not result in a net increase in allowable emissions of any air contaminant previously authorized under state minor source review. 30 TAC 116.116(e)(1). Keeping in mind the State definition of "facility," 30 TAC 116.116(e)(2) and (3) allow a Qualified Facility to demonstrate that a state modification has not occurred by comparing allowable emissions to allowable emissions before and

after a proposed change. Allowable emissions (both hourly and annual rates) are one of the criteria to provide "state qualified" flexibility because the facilities must exist and be authorized, and thereby have undergone appropriate permit review. In addition, no existing level of control can be reduced. 30 TAC 116.116(e)(8). The commenter states that for *major sources*, in addition to State requirements, the evaluation of emissions related to physical and/or operational changes is conducted on a baseline actual to either a projected actual or potential to emit base if applicable. 30 TAC 116.116(e)(4). This comparison is used to determine if an emission increase above the appropriate significance threshold for a particular Federal permitting program has occurred. From the Federal NSR standpoint, if a proposed physical or operational change would result in an emissions increase that exceeds a significance threshold, the appropriate analysis (netting) is triggered. If the results of the netting analysis indicate that a major modification has occurred, the appropriate Federal program(s) is triggered and Federal authorization must be obtained. In such a case, the Qualified Facilities Program would not be an applicable authorization pathway, and a State Minor NSR amendment must be obtained, along with the appropriate Federal NSR authorization. The exemption from the definition of "modification of an existing facility" under the Qualified Facilities Program does not relieve an owner or operator from conducting an evaluation to determine if a Federal major modification has occurred. TCEQ states that from the Federal standpoint, only the project's emission increases are evaluated (without consideration of emission decreases) to determine if a Federal applicability analysis (netting) has been triggered. If the project increases equal or exceed the netting threshold for the pollutant and this program, then a full contemporaneous netting exercise is conducted in an effort to

determine if the modification is a major modification. If the project is a major modification, then the appropriate Federal NSR program, either PSD or nonattainment review, is triggered. A permit holder cannot use the "no net emissions increase" concept that is described in the Qualified Facilities Program rules as a mechanism to avoid a Federal NSR applicability analysis (netting).

Comment: TxOGA commented that the Qualified Facilities Program establishes an allowables-based trigger and has no effect on a permit holder's compliance obligations under Federal requirements. Texas rules clearly require compliance with Federal requirements. 30 TAC 116.117(a)(4) and (d). This interpretation is also supported by TCEQ guidance.

Comment: The TCC commented in response to EPA's assertion that a Major NSR applicability determination must be based on actual emissions, not allowables. TCC argues that the Qualified Facilities rules do not circumvent any Federal requirements for major stationary sources. TCC reiterates that a qualified facility must demonstrate that the change does not result in a net increase in allowables, the source must follow notification requirements, and the source cannot relax controls at the qualified facility.

Response: We acknowledge TCEQ's description of how the State intends to implement the Qualified Facilities Program; however, we have determined that TCEQ's current rules are insufficient to prevent circumvention of Major NSR. EPA disagrees with the comments from TxOGA and TCC. The submitted Program lacks specific

requirements that would require an owner or operator who proposes a change under the Qualified Facilities program to first conduct a Major NSR applicability analysis (netting) prior to receiving (or asserting) authorization under the Qualified Facilities Program.

Comment: TCEQ commented that for facilities undergoing an intraplant trade, where the allowable emissions at one facility are increased while allowable emissions at another facility are reduced an allowable-to-allowable comparison is used only to determine if a new emissions increase has occurred for State purposes. The emissions are reviewed simultaneously, which is more stringent than the Federal requirement that only requires contemporaneous emissions. If a net emissions increase has occurred, an owner or operator cannot use the Qualified Facilities Program to authorize the proposed project, and must find another State mechanism to obtain proper authorization. In addition, the commenter states that the owner or operator must submit pre-change notification if the intraplant trade moves emissions from the interior of a plant site closer to a property line. This gives TCEQ staff the ability to evaluate public protectiveness and evaluate any potential changes in off property impacts as they relate to all contaminants and pollutants with national standards, i.e. the NAAQS. This intraplant trade capability only exists to the extent that the project is a Minor NSR action, and does not apply if a major modification has been triggered under Federal NSR requirements.

Response: EPA disagrees with the commenter that under the Texas rules the Program's intraplant trading does not apply if a major modification has been triggered. As stated above, the program fails to require a Major NSR applicability analysis and is

insufficient to prevent circumvention of Major NSR. Intraplant trading based on allowables to allowables netting is prohibited under Major NSR. *See State of New York et al., v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005). However, such netting may be permissible for a Minor NSR program, provided that the netting provisions assure protection of the NAAQS. *See* 74 FR 48450, at 48462. As discussed above, Texas's Qualified Facilities Program does not meet this requirement. EPA also finds that the Program does not adequately define a contemporaneous (or simultaneous) period or require that emission reductions occur within a specified period. As discussed above, we find that the Program fails to meet the Minor NSR netting requirement for a defined period in which the reductions must occur.

Comment: TIP and BCCA commented that the Qualified Facilities program exceeds Federal benchmarks for allowable-based Minor NSR triggers. This program is one of the mechanisms that EPA encouraged in its Flexible Air Permitting Rule (FAP) (74 FR 51418, 15423). Further, the program is more stringent than the Federal FAP Program because it requires up-to-date BACT. The Qualified Facilities Program is also comparable to the proposed allowables-based minor NSR trigger in EPA's proposed Indian Country rule, in which EPA allows the use of allowables to allowables netting. To justify the use of an allowables test, EPA distinguished the definition of "modification" under Minor NSR from that used for Major NSR. 71 FR 48696, 48701 (*citing State of New York, et al., v. EPA* (D.C. Cir. Jun. 24, 2005)). The Qualified Facilities rules meet these criteria and are more stringent than the Federal model because it only extends this flexibility to well-controlled facilities.

The commenter reiterates that the Qualified Facilities Program does not effect a permit holder's obligation to comply with Federal requirements. An allowables-based trigger is permissible because the CAA and Federal regulations do not mandate a method for determining minor NSR. The Environmental Appeals Board confirmed that there is no mandated methodology for the emissions test used for minor NSR. *In re Tennessee Valley Authority*, 9 EAD 357, 461 (EAB September 15, 2000). Again, EPA employed an allowables-to-allowables test in its proposed Indian Country rule. States have great flexibility to determine applicability for Minor NSR and that includes the authority to use an allowables-based trigger. TCEQ rules articulate an overriding obligation to comply with Federal requirements. 30 TAC 116.117(a)(4) and (d). Therefore, the current Qualified Facilities rules prevent circumvention of Major NSR.

Response: EPA disagrees with the commenter. This rulemaking disapproves netting under the Qualified Facilities Program for Major NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the source can take advantage of the Program. In contrast to the Qualified Facilities Program, under the proposed Indian Country rule, 40 CFR 49.153 would explicitly require the proposed new source or modification to determine applicability to Major NSR before taking advantage of the program. The source could only use allowables netting under the proposed Indian County rule after a Major NSR applicability determination. *See* 71 FR 48696, at 48705, 48728-48729. The Qualified Facilities rules are deficient because they lack such a

requirement. Further, as described above, the Program fails to meet several other netting requirements for an approvable Minor NSR netting program.

EPA's FAP rule is an Operating permit under Title V, not Title I. 74 FR 51418, 51419. While the FAP rule recognizes the use of advance approval programs under Minor NSR, the use of such programs must ensure environmental protection and compliance with applicable laws. "[FAPs] cannot circumvent, modify, or contravene any applicable requirement and, instead, by their design must assure compliance with each one as it would become applicable to any authorized changes." *See* 74 FR 51418, 51422. Further, advance approval under the FAP must be made at the time of permit issuance, and consider the alternate operating scenarios for air quality impacts, control technology, compliances with applicable requirements, etc. Under Major and Minor NSR, advance approval must ensure compliance with control strategy and non-interference with attainment and maintenance of NAAQS for each operating scenario as required by 40 CFR 51.160. We do not see how the Texas Qualified Facility Rule meets these requirements.

D. Comments Addressing Whether the Qualified Facilities Rules are Practically Enforceable

1. Comments generally supporting proposal.

Comment: The UT Environmental Clinic commented that the rules fail to ensure that netted reductions are enforceable.

Response: We agree with the commenter that the Program is unenforceable because it fails to explicitly require that a permit application must be submitted for the change and for any relied-upon emissions reductions in the netting analysis. Because the Program is an exemption from a preconstruction permit, and does not require a permit, the Program must qualify as a *de minimis* exemption to be approvable. We find that the Program does not qualify as a *de minimis* exemption from Minor NSR. The legal test for whether a *de minimis* threshold can be approved is whether it is consistent with the need for a plan to include legally enforceable procedures to ensure that the State will not permit a source that will violate the control strategy or interfere with NAAQS attainment, as required by 40 CFR 51.160(a)-(b). 74 FR 48450, at 48460. The State failed to demonstrate that this exemption will not permit changes that will violate the Texas control strategies or interfere with NAAQS attainment. Therefore all of the requirements under 40 CFR 51.160(a)-(b) apply to the Program.

Additionally, the Program allows too long of a lag time before a revised permit is issued in certain circumstances that can lead to a violation of a NAAQS, RFP, or control strategy without the TCEQ becoming aware of it in a timely manner. We proposed that the lag time for reporting a change under the Program should be no longer than six months, rather than a year, but we requested comment on whether six months is an acceptable lapse of time to ensure noninterference with the NAAQS and control

strategies. 74 FR 48450, at 48462. We received no comments on this issue except that TCEQ stated they will consider this change during rulemaking. Therefore, we find that the Program allows too long of a lag time before reporting "qualified" changes.

Comment: The UT Environmental Clinic commented that the Program is clearly inadequate to ensure protection of the NAAQS and PSD increments and to prevent violations of control strategies.

Response: EPA agrees a Minor NSR SIP must include legally enforceable procedures enabling the State to determine whether construction or modification would violate a control strategy or interfere with attainment or maintenance of the NAAQS. 40 CFR 51.160(a)-(b). Furthermore, any Minor NSR SIP revision submittal that is a SIP relaxation, such as this Qualified Facilities Program, must meet section 110(l). The Qualified Facilities SIP submittal is a relaxation under CAA section 110(l) because it provides an exemption from NSR permitting not previously available to sources. This SIP relaxation creates a risk of interference with NAAQS attainment, RFP, or any other requirement of the Act. EPA lacks sufficient available information to determine that this SIP relaxation would not interfere with any applicable requirement concerning attainment and RFP, or any other requirement of the Act. *See* 74 FR 48450, at 48463.

2. Comments generally opposing proposal.

Comment: ERCC commented that the Qualified Facilities Program is enforceable for several reasons. The program's regulations include enforceable registration and recordkeeping requirements. Documentation must be maintained for all Qualified Facility changes that describes the change and demonstrates compliance with the Qualified Facility Program as well as state and Federal law. *See* 30 TAC 116.117(a). TCEQ regulations also require that, at a minimum, an annual submission is made to the agency documenting any qualified facility changes not incorporated into a facility permit. *See* 30 TAC 116.117(b). Pre-change qualification and approval are required for certain changes including: changes that affect BACT or where MAERT is not available (30 TAC 116.118); certain intraplant trading (30 TAC 116.117(4)); or if the change will affect compliance with a permit condition (30 TAC 116.117(3)). EPA's general comments questioning the proper permit application or registration for qualified facility authorization are unclear given the minor source nature of the program and its function as an exemption from a preconstruction permit. *See* 74 FR 48450, at 48462. The Program adequately imposes recordkeeping, reporting, notification and approval regulations to satisfy the minor NSR enforceability requirements.

Comment: TIP and BCCA also commented in response to EPA's argument that the Qualified Facilities Program is not enforceable because changes are not reflected in a permit. The program is a minor NSR triggering program. Instead of permit revision, a facility qualified to invoke the program must notify TCEQ of changes under the Qualified Facilities rules. 30 TAC 116.118. The commenters explain the scenarios when notification is required and the requirements for effective notification under the rules.

Commenters also state that if a change implicates a permit special condition, the permit holder must revise its permit special condition using the procedures specified in Chapter 116, New Source Review. 30 TAC 116.116(b)(3).

Comment: The TxOGA commented that the Qualified Facilities Program is a minor NSR triggering provision that requires facilities to retain documentation and notify TCEQ of changes under the program. A facility must be qualified at the time the change is to occur. The program is enforceable because the rules contain notification and recordkeeping requirements.

Response: EPA disagrees with the commenters. The Program does not meet the Federal requirements for practical enforceability. To be approvable, a Minor NSR program must include enforceable emissions limits. *See* 74 FR 48450, at 48462. The Program is not clear that each Qualified Facility involved in the netting transaction must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. *See* 74 FR 48450, at 48462. Therefore, the Program is unenforceable. Additionally, the Program allows too long of a lag time before a revised permit is issued in certain circumstances that can lead to a violation of a NAAQS, RFP, or control strategy without the TCEQ becoming aware of it in a timely manner. Because the Program is an exemption from a preconstruction permit, and does not require a permit, the Program must qualify as a *de minimis* exemption to be approvable. We find that the Program does not qualify as an approvable *de minimis*

exemption from Minor NSR. *See* 74 FR 48450, at 48462; Section V.D.1. above. Therefore all of the requirements under 40 CFR 51.160(a)-(b) apply to the Program. As described throughout this notice, the Qualified Facilities Program fails to meet all of these requirements. *See* 74 FR 48450, at 48460. As stated above, the Program fails to require a permit that reflects all of the changes that occurred in the netting process and provides enforceable emissions limits. The notification and recordkeeping requirements, while beneficial, are not sufficient under Federal requirements to ensure enforceability.

E. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Major New Source Review

1. Comments generally supporting proposal.

Comment: The UT Environmental Clinic comments that nothing in the Qualified Facility statute or rules limits applicability to minor modifications. The rules require documentation at the plant site sufficient to comply with Nonattainment NSR and PSD, but do not clarify that changes that constitute a major modification cannot be made through a Qualified Facility change.

The commenter further stated that because the Qualified Facilities rules can be used to authorize major modifications, the rules fail to meet the substantive requirements of Nonattainment NSR and PSD. For emission increases associated with PSD, the Qualified Facilities rules fail to require: (1) Best Available Control Technology; (2) an

air quality analysis of impacts on the NAAQS and PSD increments; and (3) additional impact analysis associated with the implementation of the new source or modification. For emission increases associated with Nonattainment NSR, the Qualified Facilities rules fail to require: (1) Lowest Achievable Emission Rate; (2) emission offsets; and (3) demonstration of compliance by other facilities in the State.

Response: These comments are consistent with EPA's analysis concluding that Texas's Qualified Facilities Program does not meet Major NSR Substantive requirements as discussed at 74 FR 48450, at 48458-48459.

EPA agrees that the Program is deficient because it lacks provisions that require a Major NSR applicability determination for a change at a Qualified Facility before it is exempted from the permitting requirements. The Program's regulations do not contain any emission limitations, applicability statement, or regulatory provision restricting the change to Minor NSR. This lack of such express provisions distinguishes the Qualified Facilities Program from the Texas Minor NSR SIP rules for Permits by Rule in Chapter 106 and Standard Permits in Chapter 116, Subchapter F. The Standard Permits rules require a Major NSR applicability determination at 30 TAC 116.610(b), and prohibit circumvention of Major NSR at 30 TAC 116.610(c). Likewise, the Permits by Rule provisions require a Major NSR applicability determination at 30 TAC 106.4(a)(3), and prohibit circumvention of Major NSR at 30 TAC 106.4(b). The absence of these provisions in the Qualified Facilities rules creates an unacceptable ambiguity in

the SIP. Therefore, the Program could allow circumvention of Major NSR. *See* 74 FR 48450, at 48456-48458.

EPA also agrees that the Program fails to address the required air quality impacts analysis. The comments concerning BACT, LAER, emissions offsets and a demonstration of compliance by other facilities in the State go beyond EPA's analysis in the proposal and are outside the scope of this rulemaking.

Additionally, section 110(l) of the Act prohibits EPA from approving any revision of a SIP if the revision would interfere with any requirement concerning attainment and RFP, or any other requirement of the Act. There is not sufficient available information to enable EPA to determine that the submitted Program would not interfere with any requirement concerning attainment and RFP, or any other requirement of the Act. *See* 74 FR 48450, at 48459; and response above.

Comment: The Office of the Mayor, City of Houston, Texas, recognizes that the Qualified Facilities Program has no regulatory provisions that clearly prevent the Program from circumventing Major NSR SIP requirements thereby allowing changes at existing facilities to avoid the requirement to obtain preconstruction authorizations. Therefore, major sources of emissions are making major modifications to their facilities without going through the permitting process. The commenter states that this is a fatal flaw in the program, it is inconsistent with the CAA and should not be included in the SIP.

Response: The comments by the Office of the Mayor, City of Houston, Texas, are consistent with EPA's conclusions as discussed at 74 FR 48450, at 48456-48457 and response above.

2. Comments generally opposing proposal.

Comment: The TCC comments that Qualified Facilities is a Minor NSR Program because TCEQ's rules clearly require sources making changes under the Program to submit specific documentation, including "sufficient information as necessary to show that the project will comply with 40 CFR 116.150 and 116.151 of this title (relating to Nonattainment Review) and 40 CFR 116.160-116.163 of this title (relating to Prevention of Significant Deterioration Review) and with Subchapter C of this Chapter 116 (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (CAA 112(g), 40 CFR Part 63))." 30 TAC 116.117(a)(4).[10]

Response: As stated in the above, TCEQ's rules for Qualified Facilities are insufficient to prevent circumvention of major NSR. *See* 74 FR 48450, at 48456-48458.

Comment: ERCC commented that the Qualified Facilities Program is limited to Minor NSR. Qualified Facilities mandates compliance with 40 CFR 51.165 and 51.166, by clearly stating that any change authorized by Qualified Facilities shall not "limit the

[10] In a separate SIP submittal dated February 1, 2006, Texas recodified the provisions of Subchapter C into Subchapter E. TCEQ's rules also state that nothing in the rules governing the Program shall limit the applicability of any Federal requirement. 30 TAC 116.117(d).

application of otherwise applicable state or Federal requirements." TCAA 382.0512(c). TCEQ regulations require that Qualified Facilities changes must be documented minor source modifications. *See* 30 TAC 116.117(a)(4); 30 TAC 116.117(d). EPA's dismissal of Section 116.117(a)(4) as a recordkeeping provision is unjustified. 74 FR 48450, at 48457. This Qualified Facilities regulatory reference to the PSD and NNSR programs requires the regulated entity to document that the change is in compliance with the Federal major source permitting programs and in compliance with state and Federal law.

Response: As stated above, the Qualified Facilities rules are insufficient to prevent circumvention of Major NSR. 74 FR 48450, at 48456-48458.

Although there are recordkeeping requirements in the Program at submitted 40 TAC 116.117(a)(4) requiring owners and operators to maintain documentation containing sufficient information as may be necessary to demonstrate that the project will comply with the Federal CAA, Title I, parts C and D, these are the same general provisions as those in the SIP at 30 TAC 116.111(a)(2)(H) and (I) for Minor *and* Major NSR SIP permits. These recordkeeping requirements, although necessary for NSR SIP approvability, cannot substitute for clear and enforceable provisions, consistent with Texas's other Minor NSR programs, that limit applicability in the submitted Program to Minor NSR only. 74 FR 48450, at 48456-48457.

Comment: TIP and BCCA comment that sources cannot use the Qualified Facilities Program to circumvent Major NSR. 30 TAC 116.117(a)(4) and (d); *Modification of*

Existing Facilities Guidance, at 2. Senate Bill 1126, which authorized the Qualified Facilities program, does not supersede any Federal requirements. Further, "[i]f a change made under the qualified facility flexibility would result in the violation of a permit special condition, the permit holder must revise the permit special conditions to stay in compliance with the permit," through either the permit alteration process under 30 TAC 116.116(c) or the notification process of 30 TAC 116.117(d). *Modification of Existing Facilities Guidance*, at 9. Therefore, any changes to a facility must comply with Federal NSR and PSD rules. To further show that the current Qualified Facilities rules are sufficient to prevent circumvention, commenter cites to EPA's proposed Indian Country rule and recently approved state SIPs that do not contain explicit language calling for a major NSR applicability determination before use of the minor NSR tools. ALASKA ADMIN. CODE tit. 18, § 50.502, approved 72 FR 45378 (August 14, 2007); 7 DEL. CODE REGS. § 1102, 65 FR 2048 (January 13, 2000) (granting limited approval based on EPA's concerns about public participation provisions). Further, no Federal requirement mandates such language. Therefore, it is arbitrary for EPA to require Texas to include additional language. *CleanCoalition v. TXU Power*, 536 F.3d 469, 472 (5th Cir. 2008).

Response: As stated above, EPA finds that the Qualified Facilities regulatory provisions are inadequate to prevent circumvention of Major NSR and limit the Program to minor modifications. TCEQ's rules and guidance are not clear on their face that circumvention of Major NSR requirements is prohibited. EPA does not understand how the permit alteration and notification requirements are relevant to the issue of circumvention of Major NSR. EPA disagrees with the commenter's analogy to the

proposed Indian Country Minor NSR rule. Today's rulemaking disapproves the Qualified Facility Program for Major NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the source can take advantage of the Program. In contrast, under the proposed Indian Country rule, 40 CFR 49.153 would explicitly require the proposed new source or modification to determine applicability to Major NSR before taking advantage of the program. 71 FR 48696, at 48705, 48728-48729. The source could only use allowables netting under the proposed Indian Country rule after it determined that Major NSR does not apply to the project. The Qualified Facilities rules are deficient because they lack such a requirement, i.e., that Major NSR does not apply to the change.

Comment: The ERCC commented that EPA sent a comment letter on the Qualified Facilities proposed rule and agreed that it "adequately addresses the applicability of major sources and major modifications with respect to PSD and NA permitting requirements." 21 Tex. Reg. 1569 (February 27, 1996).

Response: We acknowledge our 1995 comment letter stating that Texas adequately satisfied our concern that the Qualified Facilities Program, as proposed, would not circumvent or supersede any Major NSR SIP requirements. Since we sent that letter, however, the Texas Legislature has revised the Texas Clean Air Act significantly. Specifically, in 1999, the Texas legislature added an explicit statutory prohibition against the use of an Exemption or Permit by Rule or a Standard Permit for major modifications.

See Texas Health and Safety Code 382.05196 and .057. These 1999 legislative actions required a new legal review of the statutory definition for ‘‘modification of existing facility’’ to see if it was still limited to minor modifications. It is EPA’s interpretation that the 1999 legislative changes made this statutory definition ambiguous. 74 FR 48450, at 48456-48457.

F. Comments Addressing Whether the Qualified Facilities Rules Meet Federal Requirements for Minor New Source Review

1. Comments generally supporting proposal.

Comment: The UT Environmental Clinic commented that the CAA requires SIPs to include a program for “regulation of the modification and construction of any stationary source.” 42 U.S.C. 110(a)(2)(C). The program must prohibit any sources, including minor sources, from emitting pollution in amounts that contribute significantly to nonattainment and maintenance of the NAAQS or interfere with measures included in the SIP. 42 U.S.C. 110(a)(2)(D)(i)(I)-(II). EPA has recognized the valuable role that Minor NSR programs play in ensuring that air quality is protected from emissions that are not subject to Major NSR. Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations, U.S. EPA, Nov. 2002, at I-5-I-12. The Qualified Facilities Program is deficient as a Minor NSR program because:

- The Qualified Facility rules do not require enforceable limits. Qualified Facilities provide notification of "qualified" changes on form PI-E,[11] which TCEQ acknowledges is not enforceable. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY *Guidance for Air Quality, Qualified Changes Under Senate Bill 1126* (Dec. 2000), 27 [hereinafter *Qualified Facilities Guidance*]. Without enforceable limits, facilities can use emission reductions as part of a netting analysis and subsequently increase those emissions or rely on these reductions to offset other increases. Some Qualified Facility representations are consolidated into a preexisting permit upon revision or renewal at the discretion of the source. Even if representations in the PI-E were enforceable, there are no monitoring or reporting requirements to demonstrate compliance. 30 TAC 116.117(a). *See* 74 FR 48450 (Sept. 23, 2009), Docket, *Technical Support Document*, pg. 22.
- The Qualified Facility Rules do not include a pre-approval mechanism for all authorized emission increases. The rules have no mechanism that prevents implementation of Qualified Facility changes that may violate a control strategy or interfere with attainment or maintenance of the NAAQS. The Program only requires Qualified Facilities to obtain pre-approval of a Qualified Facility change if it involves interplant[12] trading above a "reportable limit." 30 TAC 116.117(b)(4). Facilities that do not rely on interplant trading are only required to report their changes on an annual basis. 30 TAC 116.117(b)(1).

[11] 30 TAC §116.117(b). See regulation text on pages 23-24 of the TSD for this action, which refer to 30 TAC 116.117(b)(2) and (4).
[12] Although the commenter refers to "*inter*plant" trading, the Texas rules referred to by the commenter relates to "*intra*plant" trading.

Response: As stated above at Section V.D.1, EPA agrees with the first point that the submitted rules are practically unenforceable because the reductions are not incorporated into a permit. 74 FR 48450, at 48462.

EPA agrees with the commenter that the Program does not include a pre-approval mechanism for all authorized emission increases. Under section 110(a)(2)(A) and (C) of the Act a Minor NSR SIP must require enforceable emission limits for all minor modifications. The Texas Program is not clear that for each Qualified Facility involved in the netting transaction, the owner or operator must submit a permit application and obtain a permit revision reflecting all of the changes made to reduce emissions (relied upon in the netting analysis) as well as reflecting the change itself that increased emissions. Furthermore, the Program's rules at 30 TAC 116.116(e)(4) and 116.117(b)(1)-(4) are not clear that the PI-E form is a *permit application or registration* that must be submitted and that a revised permit must be issued by TCEQ to reflect the changes made by all of the participating Qualified Facilities. There is no discussion of when TCEQ issues the revised permit. *See* the submittals at 30 TAC 116.117(b); 74 FR 48450, at 48462.

2. Comments generally opposing proposal.

Comment: The TCEQ commented that it has always considered the Qualified Facilities Program to be a Minor NSR Program although it is not stated in the rule. The rule requires the person making a change to maintain sufficient documentation to

demonstrate that the project will comply with 30 TAC 116.150 and 116.161 (Nonattainment NSR), 116.160-116.163 (Prevention of Significant Deterioration Review), and Chapter 116, Subchapter C (relating to implementing section 112(g) of the Act. 30 TAC 116.117(a)(4). A major modification may not occur without going through nonattainment or PSD review. If a project is determined to be a major modification, under PSD and/or nonattainment rules,[13] the owner/operator must obtain a Federal NSR permit/major modification. Then Qualified Facilities Program does not impair TCEQ's authority to control air pollution and take action to control a condition of air pollution if TCEQ finds that such a condition exists. Texas Water Code section 5.514. TCEQ commits to work with EPA to improve and clarify the rule language to ensure that the Qualified Facilities Program is specifically limited to Minor NSR changes. Texas comments that it does not apply the Qualified Facilities program to projects that are subject to Major NSR or subject to section 112(g) of the Act.

Response: We appreciate TCEQ's willingness to work with EPA to improve and clarify its rules to ensure that the Qualified Facilities Program does not apply to projects that are subject to Major NSR or subject to section 112(g). However, the Program is deficient because it fails to include specific provisions in its rules that assure that the Qualified Facilities Program does not apply to projects that are subject to Major NSR or subject to section 112(g). *See* 74 FR 48450, at 48456-48457.

Comment: ERCC commented that EPA has failed to demonstrate the proposed revisions interfere with Texas's ability to achieve the NAAQS. Specifically:

[13] 40 CFR 51.165(a)(1)(v).

- Texas requires all air emissions from stationary sources (including minor sources) receive authorization from the State. Texas has developed an extensive program to meet the permitting and resource challenges of this requirement and the State's numerous and varied emission sources. States have discretion under the CAA to implement the state minor source program as long as it does not "interfere with attainment of the NAAQS. Aside from this requirement, which is stated in broad terms, the Act includes no specifics regarding the structure or functioning of minor NSR programs… as a result, SIP-approved minor NSR programs can vary quite widely from State to State." *Operating Permit Programs*; *Flexible Air Permitting Rule*; *Final Rule*, 74 Fed. Reg. 51,418 at 51,421 (Oct. 6, 2009). Therefore, ERCC requests that EPA re-evaluate and withdraw the proposed disapprovals. Texas air quality has shown dramatic improvement because of the three submitted programs. EPA fails to recognize that these programs are similar to other approved state minor NSR programs.
- EPA's proposed disapprovals do not meet Congress' or the Courts' documented standards for SIP disapproval. The CAA grants EPA authority to disapprove a SIP revision if such revision would interfere with the state's SIP. A revision interferes with the SIP if it impedes the state's ability to achieve the NAAQS. 42 U.S.C. 7410(l); S. Rep. No. 101-228, at 9, 1990 U.S.C.C.A.N. 3385, 3395; and *Train v. NRDC*, 421 U.S. 60, 79 (1975). The commenter argues that EPA has the burden to demonstrate that the submittals interfere with the NAAQS, but EPA's proposals shift this burden to Texas. *See Hall v. EPA*, 273 F.3d 1146, 1161 (9th Cir. Cal. 2001) (*citing Train*, 421 U.S. at 93 *and Ober v. Whitman*, 243 F.3d 1190,

1195 (9th Cir. 2001)) (requiring EPA's analysis to "rationally connect" approval of a revision to an area's likelihood of meeting the NAAQS).

- Since their submittal to EPA, the State's implementation of these rules has significantly reduced statewide emissions. These improvements can be demonstrated by reviewing both the records of emissions reductions and the reductions measured by Texas ambient air quality monitors.

ERCC further commented that Qualified Facilities is protective of air quality by limiting the use of this authorization under 30 TAC 116.116(e) and 30 TAC 116.10 (11)(E) and providing incentives to implement emission reductions. Like the Qualified Facilities Program, EPA's proposed Indian Country Minor NSR program is based upon an increase of allowable and not actual emissions. 71 FR 48696, at 48701. The EPA-developed Minor NSR program also utilizes emission rates in lieu of air quality impacts to determine exemptions from the Minor NSR definition of modification because "applicability determinations based on projected air quality impacts would be excessively complex and resource intensive." Id. at 48701.

Response: We agree that states have great flexibility to create their own Minor NSR SIP programs. However, at a minimum, those Minor NSR SIP programs must meet all of the Federal requirements. Likewise, the Qualified Facilities Program must meet all Federal requirements under the CAA in order to be approvable. Section V.C.1-2. As discussed throughout our proposal and this final notice, the current Qualified Facilities Program fails to meet all requirements. Moreover, the Qualified Facilities Program

would be an exemption from the Texas Minor NSR SIP. The Program does not provide an alternative Minor NSR permit authorization process but instead exempts facilities from obtaining a NSR permit for changes. The State failed to demonstrate that this exemption is *de minimis* and thus that the exempted changes will not violate the Texas control strategies or interfere with NAAQS attainment, as required by section 110(a)(2)(c) and 40 CFR 51.160. 74 FR 48450, at 48460; *see also* Section V.C.1-2, D.1, and G. of this Response to Comments. Additionally, EPA lacks sufficient available information to determine that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l) of the Act. 74 FR 48450, at 48463; *see also* Section V.D.1.

EPA disagrees with the commenter's analogy to the proposed Indian Country Minor NSR rule. Today's rulemaking disapproves netting under the Qualified Facilities Program for Minor NSR, in part because the Program fails to first require a Major NSR applicability demonstration to show that a proposed change does not trigger Major NSR before the Qualified Facility can take advantage of the Program. The proposed Indian Country rule would explicitly require the proposed new source or modification first determine applicability to Major NSR before taking advantage of the program. 71 FR 48696, at 48705, 48728-48729. The source could only use allowables netting under the proposed Indian Country rule after it determined that Major NSR does not apply to the project. The Qualified Facilities rules are deficient because they lack the requirement for a Major NSR applicability determination, not because the Program allows allowables

netting under Minor NSR. Further, while the commenter is correct that the proposed Indian Country rule would allow the use of emissions rates in lieu of air quality impacts, the use of emissions rates is only to establish applicability under Minor NSR. Such an approach is acceptable as long as the program assures protection of the NAAQS. 71 FR 48696, at 48701.

Comment: TIP and BCCA commented that SIP revisions are approvable if they do not interfere with the NAAQS. States have the primary responsibility for developing plans for attainment and maintenance of the NAAQS. *See CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008) (stating that "EPA has no authority to question the wisdom of a State's choices of emissions limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. 7401(a)(2)"). The last ten years have seen unprecedented improvement in Texas air quality, and Texas has been implementing the Qualified Facilities program during that time. The submittal does not raise interference concerns because it strengthens the existing SIP; therefore the Qualified Facilities program should be fully approvable. The proposal states that Qualified Facilities lacks safeguards to prevent interference with attainment and maintenance of the NAAQS. The commenters correlate this deficiency with EPA's comments on two facets of the submittal that EPA proposed to find approvable as long as ambient air is protected in the trading: 1) netting is not based on contemporaneous trading; and 2) the Program's netting is not based totally on changes in actual emissions. TIP states that the existing Qualified Facilities rules contain adequate safeguards of the NAAQS. Additionally, changes are sufficiently documented and quantified to ensure that a decrease at a facility

will only be used in one netting analysis. The provision requires that sources must document compliance with Federal requirements safeguards the NAAQS. Commenter states that Qualified Facilities could be viewed as an exemption to Minor NSR requirements; however, the rules prevent changes that will violate the Texas control strategies or interfere with NAAQS attainment. Qualified Facilities flexibility is only allowed where the change will not result in a net increase above existing BACT, and BACT limits were set to protect the NAAQS. Qualified Facilities incorporates Texas's control strategies, and therefore, safeguards the NAAQS.

Response: As stated above, in order to be approved as part of the SIP, the Qualified Facilities Program must meet all applicable Federal requirements. Here, the commenter's argument is not supported by the Fifth Circuit's language in *CleanCOALition*, *536 F.3d at 472 n.3,* because the Qualified Facilities Program does not meet 42 U.S.C. 7410(a)(2)(C). EPA agrees with the commenter that the Qualified Facilities Program is an exemption to the Texas Minor NSR SIP (and can be construed to be an exemption to the Texas Major NSR SIP). A requirement for approval of an exemption to a Minor NSR SIP is a demonstration that the exemption will not permit changes that will violate a state's control strategies or interfere with NAAQS attainment. Texas failed to submit such a demonstration. In addition, EPA lacks sufficient available information to determine that this SIP relaxation would not interfere with NAAQS attainment, RFP, or any other requirement of the Act. *See* Section V.D.1 above. Furthermore, EPA cannot find any provisions in the Program that require a separate netting analysis be performed for each such change. *See* 74 FR 48450, at 48461-48462.

We also find that the Program does not prohibit future increases at a Qualified Facility, or include regulatory language that assures that any future increase at a Qualified Facility at which a previous netting reduction occurred is analyzed in totality to assure that the NAAQS are protected. The Qualified Facilities rules are deficient to protect the NAAQS for the reasons stated above, not because the Program allows allowables netting under Minor NSR. The commenter asserts that these safeguards exist in the Qualified Facilities Program but provides no citation or other basis to support its assertion. Finally, EPA finds that the Texas rules do not specifically require maintenance of information and analysis showing how a source concluded that there will be no adverse impact on air quality. 74 FR 48450, at 48462. The commenter provides no citation or other basis to show how the Qualified Facilities Program meets this requirement.

Comment: TxOGA commented that the documentation and notification requirements of 30 TAC 116.117 provide safeguards to ensure that changes will not violate the control strategy or interfere with attainment and maintenance of the NAAQS. Also, Qualified Facilities flexibility is only available where the change will not result in a net increase above BACT levels at well controlled facilities.

Response: As stated above, there is not sufficient available information to enable EPA to make a determination pursuant to section 110(l) that the Qualified Facilities Program, as a whole, would not interfere with any applicable requirement concerning attainment and RFP or any other requirement of the Act. Additionally, as required by section 110(a)(2)(C) and 40 CFR 51.160, the State failed to submit information to

demonstrate that the Program, as an exemption from the Texas Minor NSR SIP, would not permit a source that will violate the control strategy or interfere with NAAQS attainment. *See* Section V.D.1 above for more information.

G. Comments Addressing Whether Existing Qualified Facilities Have Undergone an Air Quality Analysis

Comment: The UT Environmental Clinic disagrees with EPA's statement in the proposal that any Qualified Facility will have a Major or Minor NSR SIP permit, will have been subject to an air quality analysis, and will have demonstrated that its emissions have no adverse air quality impact. 74 FR 48450, at 48560 (Sept. 23, 2009). A facility can qualify as a Qualified Facility if it uses technology at least as effective as 10-year old BACT, "regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCCA, 382.057." 30 TAC 116.11(E)(ii). Likewise, the Qualified Facility rules specifically provide for preapproval of Qualified Status of those facilities that do not have an allowable emissions limit in a permit, PI-8 or PI-E form.

The commenter further states that, while Texas rules generally require emissions to have some sort of authorization, the rules do exempt some increases from the definition of "modification," thereby allowing these emissions to avoid any review. 30 TAC 116.10(11). For emissions that must be permitted, TCEQ's rules allow the use of

various permitting mechanism that do not assure protection of the NAAQS and control strategy requirements. 30 TAC 116.110(a).

The commenter states that the rules additionally provide that unless one "facility" at an account has been subject to public notice under the Chapter 116 permitting or renewal provisions, total emissions from all facilities permitted by rules at an account shall not exceed the limits referenced in 30 TAC 106(a)(4). Because it is rare that at least one facility at an account has not been through public notice, companies are allowed to use multiple permits-by-rule to authorize emissions at a source. *See* UT Environmental Clinic Comment Letter, Attachment 5: Chart of facility PBR authorizations. TCEQ does not analyze the cumulative air quality impact of these multiple authorizations. TCEQ rules require permits-by-rule and standard permits to be "incorporated' into the facility's permit after the permit is renewed or amended; and there are no rules regarding procedures or modeling for such "incorporation."

Finally, the commenter stated that TCEQ has issued guidance that requires standard permits and PBRs that "directly affect the emissions of permitted facilities" to be "consolidated by reference" at renewal or amendment." TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Permit by Rule and Standard Permit Consolidation Into Permits*, (Sept 1, 2006), 3. Any PBRs and standard permits that do not affect emissions permitted facilities can be incorporated at the discretion of the permittee. *Id* at 4. The TCEQ guidance requires such PBRs and standard permits that are consolidated by incorporation to undergo an impacts review. Because these permits are renewed every

ten years, this review may not occur for many years. Furthermore, PBRs do not require Texas BACT.

Response: We agree with the commenter's assertion that the submitted regulations do not explicitly require an air quality impacts analysis whenever a facility uses technology at least as effective as 10-year old Minor NSR BACT, "regardless of whether the facility has received a preconstruction permit or permit amendment or has been exempted under the TCCA 382.057." Further, facilities "qualified" using technology at least as effective as 10-year old Minor NSR BACT, must use actual emissions as a baseline. *See* 30 TAC 116.10(2) and 116.116(e)(2)(C). Presumably, this provision exists because facilities "qualified" under 30 TAC 116.10(11)(E)(ii), would not have a permitted allowable emissions limit because they lack an underlying permit. If a facility could be "qualified" without having a pre-construction permit, then the facility could net-out of permit requirements without ever having an air quality analysis of the baseline allowables limit. TCEQ's comments, which are summarized below, imply that State law requires all sources in Texas to get an underlying permit, and therefore, receive an air quality impact analysis. However, we view the State's comment to be vague as to whether a permit is a pre-requisite under the Program itself. Therefore, the Qualified Facilities rules are deficient because they fail to require an underlying Texas NSR SIP permit and air quality impact analysis in order to be "qualified" under the Program.

Comments concerning the State's permit-by-rule and standard permit programs are outside the scope of this rulemaking.

Comment: TCEQ commented that the Texas Legislature created the Qualified Facilities Program to provide flexibility to permitted facilities and to provide a means by which grandfathered facilities could apply control technology and become "qualified" grandfathered facilities without triggering Federal NSR. Subsequently, in 2001, the legislature required all grandfathered facilities to obtain authorization or shutdown. The program remains in effect as emissions are controlled, no new emissions above existing allowable limits are allowed, and Federal requirements are considered and met.

In summary, the Program reinforced the TCEQ's duties under the Texas Clean Air Act to protect air quality and control air contaminant emissions by *practical and economically feasible methods*. Tex. Health & Safety Code 382.002, 382.003(9)(e). Therefore, the environment has benefitted from the Program because emissions were controlled prior to the Texas Legislature mandating shut down or obtaining authorization; air quality benefitted as demonstrated by monitoring which measured continued improvement; regulated entities benefitted because they were given flexibility; and the State benefitted by reasonable regulation that encourages responsible economic development.

TCEQ also commented that allowable emissions (both hourly and annual rates) are one of the criteria used to provide "state qualified" flexibility because the facilities must exist and be authorized, and thereby undergone appropriate permit review.

Response: As stated above, we find that the Qualified Facilities rules fail to explicitly require a permit before a facility can be "qualified" under the Program. While TCEQ asserts that to become a Qualified Facility, a facility must undergo permit review and be authorized, the State does not cite to any regulatory provision in the Program that explicitly requires such permitting authorization. EPA recognizes that State legislation subsequent to the Qualified Facilities Program required grandfathered facilities to obtain permit authorizations or shut down. There is nothing sufficiently explicit, however, in the Qualified Facilities Rules that ensures all Qualified Facilities received an air quality impacts analysis through an initial permit application review process. It is commendable that TCEQ intends to implement its Qualified Facilities Program in a manner that may benefit the environment, but Texas failed to incorporate these procedures into its regulations; therefore, these procedures are not Federally enforceable.

H. Comments on the Definitions of "Grandfathered Facility," "Maximum Allowable Emission Rate Table," and "New Facility"

Comment: TCEQ and TCC agree with EPA's proposal to approve the definitions of "grandfathered facility," "maximum allowable emission rate table," and "new facility." The TCEQ urges EPA to take final action to approve these definitions.

Response: These comments further support EPA's action to approve these definitions.

I. Comments on the Definitions of "Actual Emissions," "Allowable Emissions," "Modification of Existing Facility" at (E), and "Qualified Facility"

Comment: TCEQ confirmed that Senate Bill 1126 amended the Texas Clean Air Act by revising the definition of "modification of existing facility," which changed the factors used to determine whether a modification for State permitting (i.e. Minor NSR) has occurred. In 1996, 30 TAC Chapter 116 was revised to incorporate this legislative directive. These changes provide that modifications may be made to existing facilities without triggering the State's Minor NSR requirements whenever:

- Authorization for the facility to be modified was issued a permit, permit amendment, or was exempted from permitting requirements within 120 months from when the change will occur; or
- Uses air pollution control methods that are at least as effective as the BACT that was required within 120 months from when the change will occur.

Such facilities are designated as "qualified facilities." TCEQ considers the use of "modification" to be separate and severable from the Federal definition of "modification" as reflected in the SIP-approved Major NSR Program.

TCEQ further asserts that the definitions of "actual emissions," "allowable emissions," "modification of existing facility" at (E) "qualified facility," respectively at 30 TAC 116.10(1), (2), (11)(E), and (16), meet Federal requirements.

Response: We are disapproving these definitions because they are not severable from the Qualified Facilities Program, and the State failed to submit information sufficient to demonstrate how these definitions meet Federal requirements. The definitions of "actual emissions" and "allowable emissions" include a statement that limits these definitions only when determining whether there has been a net increase in allowable emissions under 30 TAC 116.116(e), which implements the Qualified Facilities Program, and thus makes these definitions not severable from the Program. Subsection (E) of the definition of "modification of existing facility" *only* applies to changes that do not result in a net increase in allowable emissions, which implements the Qualified Facilities Program, and thus makes this subsection not severable from the Program. The definition of "qualified facility" defines a term that is used in the Qualified Facilities Program, which makes it not severable from the Qualified Facilities Program.

Furthermore, the State did not provide sufficient information to demonstrate how these definitions meet Federal requirements. Additionally, State legislative actions in 1999 made the statutory definition of ''modification of existing facility'' ambiguous as to whether the definition is still limited to minor modifications. The State did not submit any legal support for TCEQ's assertion that the use of "modification" in the Texas Clean Air Act is for Minor NSR only; and therefore separate and severable from the definition of "modification" in the Texas Major NSR SIP. See 74 FR 48450, at 48456-48457 and Section V.E.2 above for further information.

J. Comments on the Definition of "Best Available Control Technology" ("BACT")

Comment: The UT Environmental Clinic, TCC, TIP, BCCA, TxOGA, GCLC, and TCEQ provided comments on EPA's proposed disapproval of TCEQ's definition of BACT.

Response: We are not taking final action on the definition of BACT in today's rulemaking; therefore, these comments are outside the scope of our rulemaking. They will be considered, however, in our final action on this definition.

K. Comments on Severable Portions of the Definition of "Modification of Existing Facility" at 30 TAC 116.10(11)(A) & (B)

Comment: The UT Environmental Clinic, TxOGA, TIP, BCCA, and TCEQ provided comments on EPA's proposed disapproval of TCEQ's changes to the definition of "modification of existing facility" at 30 TAC 116.10(11)(A) and (B) regarding insignificant increases.

Response: We are not taking final action on 30 TAC 116.10(11)(A) and (B) of the definition of "modification of existing facility" in today's rulemaking; therefore, these comments are outside the scope of our rulemaking. They, however, will be considered in our final agency action on these two definitions.

L. Comments on the Definition of Severable Subsection of "Modification of Existing Facility" at 30 TAC 116.10(11)(G)

Comment: The UT Environmental Clinic and TCEQ provided comments on the proposed disapproval of 30 TAC 116.10(11)(G) of the definition of "modification of existing facility.

Response: We are not taking final action on 30 TAC 116.10(11)(G) of the definition of "modification of existing facility" in today's rulemaking; therefore, these comments are outside the scope of our rulemaking. They will be considered, however, in our final agency action on this definition.

M. Comments on the Reinstatement of the Previously Approved Definition of "Facility"

Comment: The TCEQ acknowledges that EPA proposes to correct a typographical error in 72 FR 49198 to clarify that the definition of "facility," as codified at 30 TAC 116.10(6), was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. 74 FR 48450, at 48455 at n.6.

Response: EPA thanks TCEQ for its acknowledgement that the definition of "facility" at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. We are making the administrative change to correct the typographical error in the Code of Federal Regulations.

In our proposed rule notice, we requested comments on the State's legal meaning of the term "facility." *See* 30 TAC 116.10(6). We stated that the interpretation of this term is critical to our understanding of the Texas Permitting Program. We received the following comments on this issue:

1. Comments generally supporting proposal.

Comment: The UT Environmental Clinic understands that EPA's proposal is only to correct a typographical error that inadvertently removed the definition of "facility" from the SIP. The commenter notes; however, that Texas's use of this term is problematic because of its dual definitions and broad meanings. The commenter compares the Texas's definition of "facility" in 30 TAC 116.10 with the definition of "stationary source" in 30 TAC 116.12 and the definition of "building, structure, facility, or installation" in 30 TAC 116.12 and conclude that these definitions are quite similar. The commenters acknowledge that this argument assumes that one can rely on the Nonattainment NSR rules to interpret the general definitions. If one cannot use the Nonattainment NSR definitions to interpret the general definition of "facility," then one must resort to the definition of "source" in 30 TAC 116.10(17), which is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." Pursuant to this reading, a facility is more like a Federal "emissions unit." 40 CFR 51.165(a)(1)(vii). "'Emissions unit' means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant …" At least in the

Qualified Facility rules, it appears that TCEQ use of the definition of "facility" is more like a Federal "emissions unit." The circular nature of these definitions, and the existence of two different definitions of "facility" without clear description of their applicability, makes Texas's rules, including the Qualified Facility rules, vague. Commenters urge EPA to require Texas to clarify its definition of "facility" and to ensure that its use of the term throughout the rules is consistent with that definition.

2. Comments generally opposing proposal.

Comment: TCEQ responded to EPA's request concerning its interpretation of Texas law and the Texas SIP with respect to the term "facility." The definition of "facility" is the cornerstone of the Texas Permitting Program under the Texas Clean Air Act. In addition, to provide clarity and consistency, TCEQ also provides similar comments in regard to Docket ID No. EPA-R06-OAR-2005-TX-0032 and EPA-R06-OAR-2006-0133. EPA believes that the State uses a "dual definition" for the term facility. Under the TCAA and TCEQ rule, "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. Tex. Health & Safety Code 382.003(6); 30 TAC 116.10(6). A mine, quarry, well test, or road is not considered to be a facility." A facility may contain a stationary source – point of origin of a contaminant. Tex. Health & Safety Code 382.003(12). As a discrete point, a facility can constitute but cannot contain a major stationary source as defined by Federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts

of the specific application. Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to a part of a "stationary source," TCEQ translates "emissions unit" to mean "facility,"[14] which is at least as stringent as Federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC Code)." The Federal definition of "major stationary source" is not equivalent to the state definition of "source." 40 CFR 51.166(b)(1)(a). A "major stationary source"[15] can include more than one "facility" as defined under Texas law – which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit. The above interpretation of "facility" has been consistently applied by TCEQ and its predecessor agencies for more than 30 years. The TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov't Code 311.011(b). While Texas law does not directly refer to the two steps allowing deference enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, Texas law and judicial interpretation recognize *Chevron*[16] and follow

[14] The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR." 30 TAC 116.160(c)(3)

[15] Tex. Health & Safety Code § 382.003(12).

[16] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 387, 842-43 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously express intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own

similar analysis as discussed below. The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Phillips Petroleum Co v. Comm'n on Envtl. Quality,* 121 S.W.3d 502, 508 (Tex.App.—Austin 2003, no pet.), which cites Chevron to support the following: "Our task is to determine whether an agency's decision is based upon a permissible interpretation of its statutory scheme." Further, Texas courts construe the test of an administrative rule under the same principles as if it were a statute. *Texas Gen. Indem. Co. v. Finance Comm'n*, 36 S.W.3d 635,641 (Tex.App.—Austin 2000, no pet.). Texas Administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference. *Id*. The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent. *Id*. "When the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 17 (1965). This is particularly true when the rule involves complex subject matter. *See Equitable Trust Co. v. Finance Comm'n*, 99 S.W.3d 384, 387 (Tex.App.—Austin 2003, no pet.). Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods is uses to accomplish its regulatory function." *Reliant Energy, Inc. v. Public Util. Comm'n,* 62 S.W.3d 833,838 (Tex.App.—Austin 2001, no pet.)(citing *State v. Public Util. Comm'n*, 883 S.W.2d 190, 197 (Tex. 1994). In summary, TCEQ translates "emissions unit" to mean "facility." Just as an "emissions unit" under Federal law is construed by EPA as part of a major stationary source, a "facility" under Texas law can

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construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

be a part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

Comment: TCC, BCCA, TIP, and TxOGA commented that Texas rules are clear that "facility," as defined in 30 TAC 116.10(6) is equivalent to the TCEQ term "emissions unit."[17] TCC also stated that the definition of "facility" is so broad that it requires every possible source of air contaminants to obtain some type of approval from TCEQ.

Response: We have determined that Texas's use of this term "facility," as it applies to the State's Qualified Facilities Program is overly vague; and therefore, unenforceable. TCEQ comments that it translates "emissions unit" to mean "facility." Yet, Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," but the Qualified Facilities rules fail to make such a limitation. 74 FR 48450, at 48475; *compare* 30 TAC 116.10(6) *to* 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. However, TCEQ did not submit information sufficient to demonstrate that the lack of this explicit limitation in the submitted Qualified Facilities revisions is at least as stringent as the revised definition in the PSD non-PALs definition.

We recognize that TCEQ should be accorded a level of deference to interpret the State's statutes and regulations; however, such interpretations must meet applicable

[17] Additionally, the definition of "facility" is similar to the definition of "emission unit" in Texas's Title V rules. 30 TAC 122.10(8).

requirements of the Act and implementing regulations under 40 CFR part 51 to be approvable into the SIP as Federally enforceable requirements. The State has failed to provide any case law or SIP citation that confirms TCEQ's interpretation for "facility" under the Qualified Facilities Program that would ensure Federal enforceability.

Nevertheless, as stated above, the definition of "facility" at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP. Therefore, EPA is obligated to correct the typographical error and reinstate the definition of "facility" into the Code of Federal Regulations.

However, today's final disapproval of the Qualified Facilities Program is based in part on the lack of clarity of the definition of "facility" as it applies specifically to this Program. Additionally, EPA has proposed disapproval of the State's Flexible Permit Program and NSR Reform SIP submittals partially based on the need for clarity of the definition of "facility" as it applies to those programs.

N. Comments on the Definition of the Term "Air Quality Account Number"

Comment: The TCEQ commented that it no longer uses the term "air quality account number" and now uses the term "account," which is a SIP approved definition.[18]

[18] 30 TAC 101.1(1) Account – For those sources required to be permitted under Chapter 122 of this title …, all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railways, rights-of-way, waterways, or similar divisions. Approved as part of the Texas SIP at 70 FR 16129 (March 30, 2005).

Administrative changes to the Qualified Facilities Program are planned to reflect the change in terms.

Response: EPA's evaluation of "account" and "air quality account number" were based upon the SIP approved definition of "account." 74 FR 48450, at 48455, n.7. The State's comment that it no longer uses "air quality account number" but uses "account" does not change EPA's final decision to disapprove the Qualified Facilities Program SIP revision submittal. In fact, the State's using a different definition that is not in the Qualified Facilities Program's rules provides additional grounds for disapproval. The Qualified Facilities Program's rules must be clear about which sources on a site can participate in the netting process. This goes to the heart of whether the changes are made outside a major stationary source. If TCEQ makes the planned changes noted in the comment letter, the changes must be adopted and submitted to EPA for approval as a SIP revision. Upon receipt, we would review the regulatory changes and evaluate whether they meet the Act and EPA regulations.

The Texas SIP defines an ''account'' to include an entire company site, which could include more than one plant and more than one major stationary source. SIP rule 30 TAC 101.1(1), second sentence. It does not limit the combination of sources to a SIC code. As stated above, EPA interprets the Program to allow an emission increase to net out by taking into account emission decreases outside of the major stationary source. Therefore, the Program does not meet the CAA's definition of "modification" and the

Major NSR SIP requirements and is inconsistent with *Asarco v. EPA*, 578 F.2d 320 (D.C. Cir. 1978). 74 FR 48450, at 48458-48459; Section IV.B. above.

O. Comments on Whether the Qualified Facilities Rules Meet New Source Review Public Participation Requirements

1. Comments generally supporting proposal.

Comment: HCPHES commented that the State's public participation rules are not user friendly with regards to timeliness of initial notification and the time restrictions for public comment. Specifically, it is not uncommon for a permit modification or amendment notification to be delayed on occasion, which results in a shorter period for citizens as well as HCPHES to respond. These situations have unduly limited the opportunities for the public and affected agencies to be able to provide meaningful reviews and submit appropriate comments. The commenter supports EPA's conclusion to disapprove portions of the SIP as proposed until such time as TCEQ addresses all of the specifics noted in the Federal Register. In addition, HCPHES strongly supports strengthening public participation rules such that Texas citizens are able to participate meaningfully in the process.

Comment: Several members of the Texas House commented that while the Qualified Facilities Program was a legislative creation, these members of the Texas House recognize that the statutory language and associated regulations are inconsistent

with current CAA requirements regarding modifications and public participation. A particular concern is inadequate public participation.

Comment: HCPHES strongly supports strengthening public participation rules such that Texas citizens are able to participate meaningfully in the process.

Response: General comments on Texas's public participation requirements are outside the scope of this rulemaking. However, in a separate action, EPA has proposed a limited approval/limited disapproval of Texas's SIP submittal for public participation (73 FR 72001 (Nov. 26, 2008)). In addition, TCEQ has proposed revisions to these rules and EPA is working with TCEQ to strengthen its rules for public participation to ensure the State's rules comply with all Federal requirements.

2. Comments generally opposing proposal.

Comment: The UT Environmental Clinic commented that the Qualified Facilities Rules allow industrial plants to make changes that can affect neighboring residents with absolutely no notice or opportunity for participation. These rules allow modifications without meeting the Federal public participation requirements that are applicable to Nonattainment NSR and PSD permits under the Act, 40 CFR 51.161, and 40 CFR 51.166(q). TCEQ's Qualified Facilities guidance specifically states that the qualified facility notification process may be used instead of the alteration process to change permit special conditions. *Qualified Facilities Guidance*, at 14.

Response: EPA agrees with the commenter that the Qualified Facilities rules do not meet the Federal public participation requirements for each individual change, either for a Major or Minor NSR SIP revision. As discussed in more detail in Section V.D.1 above, the Program does not clearly require a permit for each change. Therefore, the Program does not provide an opportunity for public review, which circumvents public participation requirements in 40 CFR 51.161. *See* 74 FR 48450, at 48459-48460.

Comment: The UT Environmental Clinic comments that the Texas rules also allow sources to amend terms and conditions of a Major NSR or Minor NSR permit without public participation. EPA has already expressed concerns to Texas about using methods other than permit amendment for making changes to individual NSR permits. Letter to Dan Eden, TCEQ, Deputy Director, from Carl Edlund, EPA, Region 6, Director, Multimedia Planning and Permitting Division (March 12, 2008), p. 8. Letter to Richard Hyde, TCEQ, Director Air Permits Division from Jeff Robinson, EPA, Chief, Air Permits Section (May 21, 2008), p.6.

Response: The comments that TCEQ's rules allow sources to amend terms and conditions of a Major NSR or Minor NSR permit without public participation and the use of methods other than permit amendments are outside the scope of this rulemaking.

Comment: GCLC provided comments on Texas's public participation program because the public participation issues are implicated throughout the three Federal

Register notices (Qualified Facilities, Flexible Permits, and NSR Reform). GCLC considers these comments timely and appropriate because EPA's proposal directs the public to read the three pending notices and the November 2008 public participation proposal "in conjunction" with each other.

Response: We recognize the need to read the notices in conjunction with each other because the permits issued under these State programs are the vehicles for regulating a significant universe of the air emissions from sources in Texas and thus directly impact the ability of the State to achieve and maintain attainment of the NAAQS and to protect the health of the communities where these sources are located. 74 FR 48450, at 48453. However, this final rulemaking only addresses the Qualified Facilities Program. Therefore, specific issues related to the public participation submittal package are outside the scope of this rulemaking.

Comment: The ERCC commented that public review requirements have been met because the implementing regulations for Qualified Facilities were subject to notice and comment. Proposed on 20 Tex. Reg. 8308 (October 10, 1995) finalized on 21 Tex. Reg. 1569 (February 27, 1996).

Response: EPA agrees with the commenter that the Qualified Facilities rules met the public participation requirements for SIP revision submittals. EPA, however, disagrees with the commenter that the permit application public participation requirements of this submitted Qualified Facilities program meets the NSR public

participation requirements for individual permit applications. Where the adopted state rules fail to provide for the minimum public participation required under Federal law for individual permit applications, Federal public participation requirements cannot be considered met just because the deficient state rules were adopted after public notice and comment. Please see our comments above.

VI. Final Action

EPA is disapproving revisions to the SIP submitted by the State of Texas that relate to the Modification of Qualified Facilities, identified in the Table in section III.B of this action. These affected provisions include the following regulations under Chapter 116: 30 TAC 116.116(e), 30 TAC 116.117, 30 TAC 116.118, and the following definitions under 30 TAC 116.10 -- General Definitions: 30 TAC 116.10(1) – definition of "actual emissions," 30 TAC 116.10(2) – definition of "allowable emissions," 30 TAC 116.10(11)(E) under the definition of "modification of existing facility," and 30 TAC 116.10(16) – definition of "qualified facility." EPA finds that these submitted provisions and definitions in the submitted Texas Qualified Facilities Program are not severable from each other.

EPA is disapproving the submitted Texas Qualified Facilities Program as a substitute Major NSR SIP revision because it does not meet the Act and EPA's regulations. We are also disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet the Act and EPA's regulations.

The Qualified Facilities Program submittals do not meet the requirements for a substitute Major NSR SIP revisions because (1) the Program does not prevent circumvention of Major NSR; (2) the State failed to submit information sufficient to demonstrate that the Program's regulatory text requires an evaluation of Major NSR applicability before a change is exempted from permitting; (3) the Program is deficient for Major NSR netting because (a) it authorizes the use of allowable, rather than actual emissions, to be used as a baseline to determine applicability. This use of allowables violates the Act and Major NSR SIP requirements and is contrary to *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) ("New York I") and (b) it could allow an emission increase to net out by taking into account emission decreases outside of the major stationary source and, in other circumstances, allow an evaluation of emissions of a subset of units at a major stationary source; and (4) there is not sufficient available information to enable EPA to make a determination that the requested SIP revision relaxation would not interfere with any applicable requirements concerning attainment, RFP, or any other applicable CAA requirement, as required by section 110(l).

The Qualified Facilities Program submittals do not meet the requirements for a Minor NSR SIP revision. The submitted Program (1) fails to ensure that the Major NSR SIP requirements continue to be met; (2) is not limited only to Minor NSR; (3) fails to include sufficient legally enforceable safeguards to ensure that the NAAQS and control strategies are protected; (4) the State failed to demonstrate that the Program's exemption from the Texas Minor NSR SIP includes legally enforceable procedures to ensure that the

State will not permit a source that will violate the NAAQS or the State's control strategies, (5) the submitted Program does not provide clear and enforceable requirements for a basic Minor NSR netting program; and (6) EPA lacks sufficient information to make a determination that the requested SIP revision relaxation does not interfere with any applicable requirements concerning attainment and RFP, or any other applicable requirement of the Act, as required by section 110(l). Therefore, we are disapproving the submitted Qualified Facilities Program as a Minor NSR SIP revision because it does not meet sections 110(a)(2)(C) and 110(l) of the Act and 40 CFR 51.160.

EPA is approving the submitted definitions for "grandfathered facility," "maximum allowable emissions rate table (MAERT)," and "new facility." Finally, EPA is finalizing an administrative correction in today's action by specifically correcting a typographical error at 72 FR 49198 to clarify that the definition of "facility" as codified at 30 TAC 116.10(6) was approved as part of the Texas SIP in 2006 and remains part of the Texas SIP.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently

owned and operated and is not dominant in its field. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 "for State, local, or tribal governments or the private sector." EPA has determined that the disapproval

action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or local law should not be approved as part of the Federally approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ``Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or

the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is

not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to

address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq*., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may

be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

_____
Dated:

_____
Al Armendariz,
Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA-Approved Regulations" is amended by revising the entry for section 116.10 to read as follows:

(c) * * *

EPA-Approved Regulations in the Texas SIP

State citation	Title / Subject	State approval / submittal date	EPA approval date	Explanation
* * * * * * *				
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
* * * * * * *				
Subchapter A—Definitions				
Section 116.10	General Definitions	8/21/02	**[Insert date of FR publication] [Insert FR page number where document begins]**	The SIP does not include paragraphs (1), (2), (3), (7)(F), (11), and (16).
* * * * * * *				

■ 3. § 52.2273 is revised by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 52.2273 Approval status.

* * * * *

(b) EPA is disapproving the Texas SIP revision submittals as follows:

(1) The following definitions in 30 TAC 116.10 – General Definitions:

(A) Definition of "actual emissions" in 30 TAC 116.10(1), submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(B) Definition of "allowable emissions" in 30 TAC 116.10(2), submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 11, 2000;

(C) Portion of the definition of "modification of existing facility" in 30 TAC 116.10(11)(E), submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 4, 2002; and

(D) Definition of "qualified facility" in 30 TAC 116.10(16), submitted March 13, 1996; repealed and re-adopted June 17, 1998 and submitted July 22, 1998; and submitted September 4, 2002;

(2) 30 TAC 116.116(e) – Changes at Qualified Facilities – submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(3) 30 TAC 116.117 – Documentation and Notification of Changes to Qualified Facilities – submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998;

(4) 30 TAC 116.118 – Pre-Change Qualification – submitted March 13, 1996 and repealed and re-adopted June 17, 1998 and submitted July 22, 1998.